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No. 92-2061

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

SCIENTIFIC-ATLANTA, INC.,
Petitioner,

v.

RUSSELL HENDERSON, *et al.*
Individually and as Class Representatives,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Can Congress, consistent with the separation of powers doctrine, direct that the courts resolve certain pending or dismissed cases arising under the Securities Exchange Act by disregarding this Court's decisions in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, —— U.S. ——, 111 S. Ct. 2773 (1991), and *James B. Beam Distilling Co. v. Georgia*, —— U.S. ——, 111 S. Ct. 2439 (1991)?

LIST OF PARTIES

The following parties were Plaintiffs below and are Respondents before this Court:

Mildred E. Chambers, Russell Henderson and Charles E. Moore, individually and as class representatives of a class of purchasers of Scientific-Atlanta, Inc. common stock between January 1, 1981 and August 20, 1983.

The following party was a Defendant below and is a Petitioner before this Court:

Scientific-Atlanta, Inc.*

Pursuant to Supreme Court Rule 29.4(b), Petitioner states that the constitutionality of an Act of Congress was drawn into question in the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit certified that fact to the Attorney General pursuant to 28 U.S.C. § 2403(a). The United States intervened in the action and, together with the Securities and Exchange Commission as *amicus curiae*, filed a brief in the Eleventh Circuit and appeared at oral argument.

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* Corporate entities related to Scientific-Atlanta, Inc. include Scientific-Atlanta Europe, Inc., Scientific-Atlanta, S.A., Scientific-Atlanta, Ltd., Scientific-Atlanta Mediterranean, Inc., Scientific-Atlanta W.G., Inc., Scientific-Atlanta Broadband U.K., Inc., Scientific-Atlanta International, Inc., Scientific-Atlanta Japan, Inc., SA Japan, K.K., Scientific-Atlanta Pty. Ltd., Scientific-Atlanta Chile y Compania Limitada, SA Investment Company, Scientific-Atlanta Export Corporation, Summit Technologies, Inc., Digital Video Systems Corp., Advanced Communications Engineering, Inc., Systems Communication Cable, Incorporated, Adar DISC, Inc., Scientific-Atlanta Pan American, Inc., Scientific Sales Engineering Company, Spectradyn Corporation, Scientific-Atlanta Trade 1, Inc., Scientific-Atlanta Trade 2, Inc., Scientific-Atlanta Trade 4, Inc., Scientific-Atlanta Trade 5, Inc., Oldco, GmbH, Scientific-Atlanta S.p.A.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
Initial Proceedings	2
The Enactment of Section 27A	4
The Decision Below	7
REASONS FOR GRANTING THE WRIT	8
I. SECTION 27A RAISES COMPELLING AND RECURRENT QUESTIONS CONCERNING THE CONSTITUTIONAL SEPARATION OF POWERS THAT CAN ONLY BE RESOLVED BY THIS COURT	8
A. The Decision Below Sustains Congressional Power To Revise A Judgment Of This Court And To Legislate Results And Decisional Approaches In Identified Cases	11
B. The Decision Below Misconstrues *Beam* And *Seattle Audubon*, Thereby Creating A Conflict Between Those Cases And Separation of Powers Principles	15
CONCLUSION	21
APPENDIX	1a

TABLE OF AUTHORITIES

Cases ** Page

Anixter v. Home-Stake Production Co., 977 F.2d 1533 (10th Cir. 1992), *cert. denied sub nom. Cross v. Thorner*, —— U.S. ——, 113 S.Ct. 1842 (1993) 15, 18
Berning v. A.G. Edwards & Sons, 990 F.2d 272 (7th Cir. 1993) 12, 15
Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798) 13
Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) ..... *passim*
Gilbertson v. Leasing Consultants Associates, Civil No. 86-1369-RE (D. Or. Feb. 6, 1992) 12
Gordon v. United States, 117 U.S. 697 (Appendix 1885) 8, 13
Gray v. First Winthrop Corp., 989 F.2d 1564 (9th Cir. 1993) 15, 18, 19
Harper v. Virginia Department of Taxation, —— U.S. ——, 61 U.S.L.W. 4664 (U.S. June 18, 1993) ..... *passim*
Hayburn's Case, 2 U.S. (2 Dall.) 408 (1792) 8, 13
Henderson v. Scientific-Atlanta, Inc., 971 F.2d 1567 (11th Cir. 1992) 7, 11
Hurtado v. California, 110 U.S. 516 (1884) 8, 18
International Brotherhood of Teamsters v. United States, 341 U.S. 324 (1977) 17
James B. Beam Distilling Co. v. Georgia, —— U.S. ——, 111 S. Ct. 2439 (1991) ..... *passim*
Kennedy v. Tallant, 710 F.2d 711 (11th Cir. 1983) 3
Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, —— U.S. ——, 111 S. Ct. 2773 (1991) ..... *passim*
Litton Industries v. Lehman Brothers Kuhn Loeb, Inc., 967 F.2d 742 (2d Cir. 1992) 12
McCool v. Strata Oil Co., 972 F.2d 1452 (7th Cir. 1992) 12, 18

** Additional case authorities relied upon by petitioner include numerous district court cases, listed in the Appendix to this petition at pages 40a-45a, addressing the issue presented by this petition, and several similar cases now pending in the circuit courts of appeals, listed at n.12 *infra*.

TABLE OF AUTHORITIES—Continued

	Page
Mistretta v. United States, 488 U.S. 361 (1989)	9
Morrison v. Olson, 487 U.S. 654 (1988)	13
Musick, Peeler & Garrett v. Employers Insurance of Wausau, —— U.S. ——, 61 U.S.L.W. 4520 (U.S. June 1, 1993)	5, 14, 17
Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982)	20
Robertson v. Seattle Audubon Society, —— U.S. ——, 112 S. Ct. 1407 (1992)	9, 16, 18
St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772 (1981)	7
United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977)	17
United States v. Klein, 80 U.S. (13 Wall.) 128 (1872)	8, 14
United States v. Sioux Nation of Indians, 448 U.S. 371 (1980)	13
United States v. The Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801)	16
United States v. Vogel Fertilizer Co., 455 U.S. 16 (1982)	17
Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976)	17
Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989)	10
Welch v. Cadre Capital, 923 F.2d 989 (2d Cir. 1991), *vacated and remanded sub nom. Northwest Savings Bank v. Welch*, —— U.S. ——, 111 S. Ct. 2882 (1991), *on remand*, 946 F.2d 185 (2d Cir. 1991)	4
Statutes	
15 U.S.C. § 78i(e)	2
15 U.S.C. § 78j(b)	2
28 U.S.C. § 1254(1)	2
28 U.S.C. § 2403(a)	ii
Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 476, 105 Stat. 2236, 2387 (1991) (codified at 15 U.S.C. § 78aa-1)	*passim*

TABLE OF AUTHORITIES—Continued

Legislative Materials	Page
H.R. Conf. Rep. No. 856, 101st Cong., 2d Sess. (1990)	11
H.R. 1172, 103rd Cong., 1st Sess. (1993)	10
S. 1037, 103rd Cong., 1st Sess. (1993)	10
137 Cong. Rec. S17,306 (daily ed. Nov. 21, 1991) (statement of Sen. Riegle)	4
137 Cong. Rec. S17,309 (daily ed. Nov. 21, 1991) (statement of Sen. Domenici)	6
137 Cong. Rec. S17,315 (daily ed. Nov. 21, 1991) (statement of Sen. Riegle)	6
137 Cong. Rec. H11,812 (daily ed. Nov. 26, 1991) (statement of Rep. Markey)	6
137 Cong. Rec. S18,623 (daily ed. Nov. 27, 1991) (statement of Sen. Bryan)	6
Miscellaneous	
Paul M. Bator, *What's Wrong with the Supreme Court?* 51 U. Pitt. L. Rev. 673 (1990)	10
William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L.J. 331 (1991)	10
Abner J. Mikva & Jeff Bleich, *When Congress Overrules the Court*, 79 Calif. L. Rev. 729 (1991)	11

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INTRODUCTION

Petitioner Scientific-Atlanta, Inc. ("Scientific-Atlanta") respectfully prays that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Eleventh Circuit, filed September 11, 1992.

OPINIONS BELOW

The decision of the Court of Appeals for the Eleventh Circuit is published at 971 F.2d 1567 and is reprinted in the accompanying Appendix to this petition at pages 1a-16a. The unpublished opinion of the United States District Court for the Northern District of Georgia (Vining, J.) is reprinted in the Appendix to this petition at pages 17a-34a.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), which permits review by writ of certiorari before or after rendition of a judgment or decree by a United States court of appeals. The Eleventh Circuit's decision in this case was entered on Septtmber 11, 1992. Scientific-Atlanta timely filed a Petition for Rehearing and Suggestion of Rehearing *En Banc,* which was denied by the Eleventh Circuit on February 10, 1993. The denial is reproduced in the Appendix to this petition at pages 35a-36a. This Court entered an order on May 3, 1993 extending the time for filing this petition until July 2, 1993.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent provisions of the United States Constitution and the Securities Exchange Act of 1934 ("the 1934 Act"), as amended by the Federal Deposit Insurance Corporation Improvement Act of 1991, are set forth in the Appendix to this petition at pages 37a-39a.

STATEMENT OF THE CASE

Initial Proceedings

The complaint in this case, filed in 1988, asserts a federal claim against Scientific-Atlanta based on Section 10(b) of the 1934 Act, 15 U.S.C. § 78j(b), as well as pendent state common law fraud claims, for events that occurred between January 1981 and August 1983. In 1990, Scientific-Atlanta moved for summary judgment on the ground that Respondents' Section 10(b) and state fraud claims were time-barred. Scientific-Atlanta argued that a limitations period borrowed from Section 9(e) of the 1934 Act, 15 U.S.C. § 78i(e), should govern Section 10(b) claims. Relying on then-existing prece-

dent in the Eleventh Circuit,[1] the district court rejected Scientific-Atlanta's argument, borrowed the limitations period provided by the most analogous law of Georgia, the state in which the case was pending, and ordered further proceedings.

On June 20, 1991, this Court announced two decisions that together disposed of Respondents' Section 10(b) claim. In *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,* —— U.S. ——, 111 S. Ct. 2773 (1991) (*"Lampf"*), the Court disapproved of the practice of borrowing state statutes of limitations in Section 10(b) cases and held, based upon Section 9(e) of the 1934 Act, that a uniform federal limitations period of one year from discovery of the fraud, but in no event more than three years from the acts giving rise to the claim, must be applied to all Section 10(b) claims. —— U.S. at ——, 111 S. Ct. at 2781-82 n.9. The Court further held, after full briefing and argument, *see* —— U.S. at ——, 111 S. Ct. at 2787-88 (O'Connor, J., dissenting), that this rule of law properly was applied to the claims of the plaintiffs in *Lampf.*

On the same day, the Court ruled in *James B. Beam Distilling Co. v. Georgia,* —— U.S.——, 111 S. Ct. 2439 (1991) (*"Beam"*), that "[w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcemnt of the rule." *Harper v. Virginia Department of Taxation,* —— U.S. ——, ——, 61 U.S.L.W. 4664, 4667 (U.S. June 18, 1993) (*"Harper"*) (explaining *Beam*).[2] Under *Beam,*

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[1] *See, e.g., Kennedy v. Tallant,* 710 F.2d 711, 716 (11th Cir. 1983).

[2] *See Beam,* —— U.S. at ——, 111 S. Ct. at 2446, 2447 (limiting the possible application of the balancing test for judicial retroactivity set forth in *Chevron Oil Co. v. Huson,* 404 U.S. 97, 106-07 (1971)).

therefore, this Court's construction of Section 10(b) in *Lampf* governed all pending cases, including this one.[3]

Recognizing that *Lampf* and *Beam* required a ruling in Scientific-Atlanta's favor because Respondents had not brought their claims within three years of the alleged fraudulent acts, the district court granted judgment to Scientific-Atlanta on Respondents' Section 10(b) claim, and dismissed Respondents' pendent state claims without prejudice. Respondents appealed.

The Enactment of Section 27A

While Respondents' appeal was pending in the Eleventh Circuit, Congress legislatively responded to *Lampf* and *Beam*. Two initial proposals that would have amended the 1934 Act and replaced the "one-year/three-year" limitations period with a longer statute of limitations were introduced but did not reach either the Senate or the House floor. Instead, a compromise addressing only pending and dismissed cases was enacted into law as Section 476 of the FDIC Improvement Act of 1991, codified as Section 27A of the 1934 Act, 15 U.S.C. § 78aa-1 ("Section 27A"). Section 27A does not alter the Act's "one-year/three-year" limitations period or overturn *Lampf*, but "allow[s] the *Lampf* decision to be set aside so there would, in fact, be a legal reachback to cover cases" pending at the time that *Lampf* was decided. 137 Cong. Rec.

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[3] *See, e.g., Welch v. Cadre Capital*, 923 F.2d 989 (2d Cir. 1991), *vacated and remanded sub nom. Northwest Savings Bank v. Welch*, —— U.S. ——, 111 S. Ct. 2882 (1991) (vacating the Second Circuit's refusal to apply the new "one-year/three-year" limitations period retroactively to pending Section 10(b) cases and remanding the case to the Second Circuit "for further consideration in light of" *Beam* and *Lampf*), *on remand*, 946 F.2d 185 (2d Cir. 1991) (applying the rule announced in *Lampf* retroactively, as mandated by *Beam*, and directing the district court to dismiss plaintiffs' Section 10(b) claims as untimely).

S17,306 (daily ed. Nov. 21, 1991) (statement of Sen. Riegle).[4]

Section 27A provides that the limitations period announced in *Lampf* will not govern "any private civil action commenced on or before June 19, 1991" (the last business day before the Court announced its rulings in *Lampf* and *Beam*). Instead of enacting a new statute of limitations, however, Congress directed that in these cases the courts must ignore *Lampf* and *Beam* and apply the "limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991."[5]

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[4] *See Musick, Peeler & Garrett v. Employers Insurance of Wausau*, —— U.S. ——, ——, 61 U.S.L.W. 4520, 4522 (U.S. June 1, 1993) ("*Musick*") ("Congress did no more than direct the applicable 'limitation period for any private civil action implied under section 78j(b) of this title [§ 10(b) of the 1934 Act] that was commenced on or before June 19, 1991 [the day prior to issuance of *Lampf, Pleva*].' 15 U.S.C. § 78aa-1 (Supp. III).").

[5] Congress further provided that actions previously dismissed as time-barred could be reinstated on motion by the plaintiffs. Section 27A, in its entirety, provides as follows:

> (a) Effect on Pending Causes of Action.—The limitation period for any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.
>
> (b) Effect on Dismissed Causes of Action.—Any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991—
>
> (1) which was dismissed as time barred subsequent to June 19, 1991, and
>
> (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,
>
> shall be reinstated on motion by the plaintiff not later than 60 days after the date of enactment of this section.

Pub. L. No. 102-242, § 476, 105 Stat. 2236, 2387 (1991) (codified at 15 U.S.C. § 78aa-1).

Section 27A thus temporarily reinstates the judicial practice of borrowing state statutes of limitations in "pending causes of action" and "dismissed causes of action" under Section 10(b) of the Securities Exchange Act.[6] Section 27A was enacted to relieve a class of "worthy" plaintiffs from "the most egregious part of the [*Lampf*] decision" through suspension of this Court's holdings in *Lampf* and *Beam*. 137 Cong. Rec. S18,623 (daily ed. Nov. 27, 1991) (statement of Sen. Bryan).[7] Because Congress neither overturned the Court's decision in *Lampf*, nor otherwise altered the underlying statutory basis for the ruling in *Lampf*, the statute of limitations for Section 10(b) cases today remains just as *Lampf* decided. As Senator Domenici explained, "we resolved [that] issue by not extending the statute of limitations on 10(b) type of litigation." 137 Cong. Rec. S17,309 (daily ed. Nov. 21, 1991).

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[6] It is perhaps too broad to say that Congress definitively mandated the practice of borrowing state statutes of limitations in Section 10(b) cases, because several circuits utilized federal timeliness rules even prior to the decision in *Lampf*, *see Lampf*, —— U.S. at ——, 111 S. Ct. at 2777 n.1; presumably in those circuits some variant of federal law would continue to govern. It is clear, however, that Section 27A revivifies the very circuit split that the Court resolved in *Lampf*.

[7] Before Section 27A, the rule announced in *Lampf* had been applied consistently in the lower courts, resulting in the dismissal of a number of highly publicized private securities fraud cases, including those against Michael Milken and Charles Keating. Many Members of Congress apparently thought the application of *Lampf* to plaintiffs in these cases was unfair. *See, e.g.*, 137 Cong. Rec. S17,315 (daily ed. Nov. 21, 1991) (statement of Sen Riegle) ("We must take steps to protect those investors who had cases pending prior to that decision"); 137 Cong. Rec. H11,812 (daily ed. Nov. 26, 1991) (statement of Rep. Markey) ("shockingly, over $4 billion of fraud claims, including those against Milken, Keating and Fred Carr, are threatened with pending dismissal motions solely as a result of Lampf, and that decision's retroactive application").

The Decision Below

In their brief to the Eleventh Circuit, Respondents urged the court to apply Section 27A to their case and to find their action timely pursuant to the two-year Georgia statute of limitations previously applied to their claim. Scientific-Atlanta argued that if Section 27A was so interpreted, it violated the doctrine of separation of powers as well as the due process clause of the Fifth Amendment.

The Eleventh Circuit agreed with Respondents, in a split decision. The panel majority, in an opinion written by Judge Cox that does not consider congressional authority to revise the retroactivity principles enunciated in *Beam*, found that "Section 27A is a classic example of Congress's practice of 'overruling' a statutory construction by the Supreme Court" and an example of "how our federal system is designed to operate." *Henderson v. Scientific-Atlanta, Inc.*, 971 F.2d 1567, 1571 n.4, 1572 (11th Cir. 1992). Judge Wellford dissented, concluding that the "congressional enactment in controversy, designed to affect pending litigation and to overrule Supreme Court decisions," violated the separation of powers doctrine and therefore was unconstitutional. *Id.* at 1576.[8]

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[8] The panel majority also rejected Scientific-Atlanta's argument that the language "laws applicable in the jurisdiction" in Section 27A should not be read to encompass prior erroneous interpretations of statutory law, but should instead be construed in a manner consistent with the decisions of this Court in *Lampf* and *Beam*. Scientific-Atlanta continues to believe that, consistent with the basic principle that the judiciary should interpret the laws in order to avoid serious constitutional issues, Section 27A's mandate to apply the "laws applicable in the jurisdiction" can and should be viewed as merely codifying the Court's holdings in *Lampf* and *Beam*. *See St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 790 (1981) (Stevens, J., concurring) (although legislative history may offer evidence of contrary Congressional intent, the statutory text may "simply fail[] to give effect to that intention."). For the purpose of this petition, however, we analyze this case as if the panel majority's interpretation of Section 27A was correct.

REASONS FOR GRANTING THE WRIT

I. SECTION 27A RAISES COMPELLING AND RECURRENT QUESTIONS CONCERNING THE CONSTITUTIONAL SEPARATION OF POWERS THAT CAN ONLY BE RESOLVED BY THIS COURT.

Section 27A invades core judicial functions by instructing the courts—including this Court—to ignore determinative Supreme Court precedent in a select class of cases. The majority opinion below sustains congressional power to revise this Court's judgment in *Lampf*, and to suspend the judicial retroactivity principles announced in *Beam*. *Contra Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792).[9] Section 27A attempts to legislate specific results in designated cases without changing the underlying statutory framework, in direct contravention of established separation of powers principles,[10] and in flat contradiction of traditional legislative and judicial roles.[11] Moreover,

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[9] *See generally Gordon v. United States*, 117 U.S. 697, 703 (Appendix 1885) (the principle that the Court's judgments cannot be subject to revision by Congress "was decided by this Court as long ago as 1792, in *Hayburn's Case*, 2 Dall. 409, and this decision has ever since been regarded as a constitutional law"); *Hurtado v. California*, 110 U.S. 516, 536 (1884) ("due process of law" categorically excludes from legislative power, *inter alia*, "acts reversing judgments, . . . legislative judgments and decrees, and other similar special, partial, and arbitrary exertions of power under the forms of legislation").

[10] *See, e.g., United States v. Klein*, 80 U.S. (13 Wall.) 128, 146-47 (1872) (Congress violates the separation of powers doctrine when it "prescribe[s] a rule for the decision of a cause in a particular way" where "no new circumstances have been created by legislation").

[11] *See Harper*, —— U.S. at ——, 61 U.S.L.W. at 4669 (Scalia, J., concurring) (" '[I]t is said that that which distinguishes a judicial from a legislative act is, that one is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of all future cases.' ") (citing T. Cooley, *Constitutional Limitations* 91 (1868)).

the statute requires that the courts reach congressionally desired results by reverting to a decisional approach—borrowing state statutes of limitations in Section 10(b) cases—definitively rejected by this Court in *Lampf*.

In sustaining this congressional effort to manipulate the federal judiciary, the majority below misconstrued recent decisions of this Court, including *Robertson v. Seattle Audubon Society*, —— U.S. ——, 112 S. Ct. 1407 (1992), in a manner that threatens "the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta v. United States*, 488 U.S. 361, 380 (1989). If the panel majority below is correct, no meaningful constraint remains on congressional power to revise and suspend this Court's judgments, to ordain that the courts reach specific results in designated cases, to revise or alter judicial retroactivity rules inherent in basic norms of constitutional adjudication, or to demand that the courts utilize decisional approaches prescribed by Congress contrary to the decisions of this Court.

Immediate resolution of these constitutional issues also will serve important practical ends. Doubts about the constitutionality of Section 27A have engendered enormous litigation costs that promise to continue until the matter is resolved by this Court. Although there is currently no circuit split on the constitutionality of Section 27A, there is a pervasive conflict in the district courts, *cf. Mistretta*, 488 U.S. at 371 (noting that the controversy there in question led to "disarray among the Federal District Courts"), which leaves a substantial unanswered constitutional question in the circuits in which appeals remain pending.[12] The net result has been pro-

[12] The significant split on this issue in the district courts is evident from the list of cases set forth in the Appendix to this petition at pages 40a-45a. Appeals on this issue remain pending in at least four circuits. *Axel Johnson, Inc. v. Arthur Andersen*, No.

tracted litigation and appeals whose continuation can and should be avoided by this Court's consideration of the present case.[13]

Additionally, prompt action on this issue will help to resolve a recurrent legislative question. As the Court undoubtedly knows, its decisions, both statutory and constitutional, continue to be revisited by Congress.[14] Each time Congress overturns a statutory decision and provides a remedy beyond that authorized by the Court, the same quandary posed by Section 27A arises; that is, how to deal with individual litigants whose rights have been adjudicated or otherwise resolved during the period between the Court's decision and congressional action. While Congress frequently "overrules" the Court through strictly prospective legislation, Congress continues to consider measures, like Section 27A, designed to relieve litigants of unfair "burdens" placed on them by application of an "erroneous" interpretation of a statute by the Court pursuant to an "unfair" judicial retroactivity rule.[15]

92-7624 (2d Cir.); *Pacific Mutual Life Ins. Co. v. First Republicbank Corp.*, No. 92-1662 (5th Cir.); *TGX Corp. v. Simmons*, No. 92-3375 (5th Cir.); *Ayers v. Suttliffe*, No. 92-3229 (6th Cir.); *Freeman v. Laventhol & Horwath*, Nos. 92-6191 and 92-6193 (6th Cir.); *Plaut v. Spendthrift Farm*, No. 92-5591 (6th Cir.); *Johnston v. Cigna Corp.*, No. 92-1186 (10th Cir.).

[13] *See* Paul M. Bator, *What is Wrong with the Supreme Court?*, 51 U. Pitt. L. Rev. 673, 683-84 (1990) (the Court's role should include "providing reasonable certainty and stability in the rules that govern our business and economic life").

[14] One recent study shows that between 1967 and 1990, Congress has overturned no less than 121 different Supreme Court statutory decisions and an additional 220 lower court rulings. William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L. J. 331, 424, App. I (1991).

[15] For example, the current Congress is considering "The Justice for Wards Cove Workers Act," H.R. 1172, 103rd Cong., 1st Sess. (1993) and S. 1037, 103rd Cong., 1st Sess. (1993), which would extend the congressional alteration of *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), to the plaintiffs in that very case,

The question posed in this case thus is not limited to a discrete and transient set of claims arising under the Securities Exchange Act. By contrast, this case presents a clear opportunity for the Court to address a vital and recurrent constitutional issue, and to provide Congress with much needed guidance. Moreover, because Section 27A is so clearly at odds with traditional separation of powers jurisprudence, consideration of this case provides an ideal opportunity for the Court to outline the borders of legitimate legislative action without pervasive intrusion into the legislative sphere.

A. The Decision Below Sustains Congressional Power To Revise A Judgment Of This Court And To Legislate Results And Decisional Approaches In Identified Cases.

Section 27A is not "a classic example of Congress's practice of 'overruling' a statutory construction by the Supreme Court," *Henderson,* 971 F.2d at 1571 n.4, because Congress did *not* overrule the Court's construction of the 1934 Act at all. Congress did not conclude that the Court misconstrued the 1934 Act in *Lampf*, nor did it alter Sections 10(b) or 9(e) of the 1934 Act in light of *Lampf*. Rather, it decreed that the Court's *correct* construction of the statute was not to be applied to certain litigants, including the plaintiffs in *Lampf* and similarly situated plaintiffs, despite this Court's decisions in *Beam* and *Lampf*. The statute thus creates a retroactive legis-

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despite this Court's judgment and decision. Congress has considered taking similar action in the past. *See, e.g.*, H.R. Conf. Rep. No. 856, 101st Cong., 2d Sess. 24 (1990) (indicating explicitly that the proposed Civil Rights Act of 1990 was designed to alter the outcome of certain pending and dismissed cases); *see also* Abner J. Mikva & Jeff Bleich, *When Congress Overrules the Court*, 79 Calif. L. Rev. 729, 731 (1991) (observing that this "acceleration of overrulings may reflect a dangerous view on the part of Congress that even the proper pronouncements of the Court are entitled to less respect.").

lative exception to the application of the laws of the United States.

One lower court has held that Section 27A "eliminates any retroactive effects of the *Lampf* decision" *on the Lampf parties themselves*, despite this Court's deliberate decision to apply the rule announced in *Lampf* to the parties before the Court.[16] Although the Court in *Beam* explicitly "limit[ed] the possible applications of the *Chevron Oil* analysis," —— U.S. at ——, 111 S. Ct. at 2447 (Souter, J., joined by Stevens, J.), several circuit courts have construed Section 27A's reference to "the principles of retroactivity" existing on June 19, 1991 as Congressional direction to utilize again the *Chevron Oil* test, in direct conflict with the Court's holding in *Beam*.[17]

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[16] *Gilbertson v. Leasing Consultants Associates*, Civil No. 86-1369-RE (D. Or. Feb. 6, 1992) ("reinstatement of plaintiff's 10(b) claims is granted . . . [h]owever, defendants may renew their objections to reinstatement . . . based on constitutional grounds at a later date"). *Contra Lampf*, —— U.S. at ——, 111 S. Ct. at 2782 ("plaintiff-respondent's claims were untimely").

[17] *See, e.g., Berning v. A.G. Edwards & Sons*, 990 F.2d 272, 276 (7th Cir. 1993) ("Under *Chevron Oil* we are required to balance, on a case-by-case basis, three factors in order to determine whether a new rule will be applied to parties already before the Court."); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1459 (7th Cir. 1992) (In a case affected by Section 27A, "*Chevron Oil* requires a case-by-case balancing of three factors to decide whether a new rule will be applied to the parties before the court"); *Litton Industries v. Lehman Brothers Kuhn Loeb, Inc.*, 967 F.2d 742, 752 (2d Cir. 1992) ("We determine whether to exercise the [limitations rule announced in the circuit before *Lampf*] retroactively by applying the three-part test set out in *Chevron Oil* . . . ."). *Contra Harper*, —— U.S. at ——, 61 U.S.L.W. at 4666 n.9 ("Regardless of how *Chevron Oil* is characterized, our decision today makes it clear that 'the *Chevron Oil* test cannot determine the choice of law by relying on the equities of the particular case' and that the federal law applicable to a particular case does not turn on 'whether [litigants] actually relied on [an] old rule [or] how they would suffer from retroactive application' of a new one. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. ——, —— (1991) (slip op., at 12) opinion of Souter, J.).").

Congress does not have constitutional authority to revise a judgment of this Court, or to suspend application of this Court's instructions to the lower courts on the appropriate method for addressing and resolving judicial issues. Since *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792), this Court has recognized that "no decision of any court of the United States can, under any circumstances, . . . be liable to a revision, or even suspension, by the legislature itself, in whom no judicial power of any kind appears to be vested." [18] The Court has observed more recently that "legislative review of a judicial decision would interfere with the independent functions of the Judiciary." *United States v. Sioux Nation of Indians*, 448 U.S. 371, 392 (1980).[19]

By directing that the courts grant specific litigants relief from the "unfair" decisions in *Lampf* and *Beam*, Sec-

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[18] 2 U.S. (2 Dall.) at 410. These views of the Circuit Court of North Carolina, presented in a letter to the President from Justice Iredell and District Judge Sitgreaves, have since "been taken to reflect proper understanding of the role of the judiciary under the Constitution." *Morrison v. Olson*, 487 U.S. 654, 677-78 n.15 (1988).

[19] *See Sioux Nation*, 448 U.S. at 427 ("Article III vests 'the judicial Power . . . of the United States' in the federal courts. Congress is vested by Article I with *legislative* powers, and may not itself exercise an appellate-type of review of judicial judgments to alter their term, or to order new trials of cases already decided.") (Rehnquist, J., dissenting) (emphasis in original); *Gordon v. United States*, 117 U.S. 697, 700 (Appendix 1885) ("No appeal is given from [this Court's] decisions, nor any power given to the legislative or executive departments to interfere with its judgments or process of execution"); *see also Calder v. Bull*, 3 U.S. (3 Dall.) 386, 398-99 (1798) (Iredell, J., dissenting) (characterizing Connecticut legislation analogous to Section 27A in its purpose and effect as "judicial in its nature," and implicitly suggesting that had the legislation been federal, it would have exceeded the carefully defined "objects of the [federal] legislative power"). Section 27A is manifestly "judicial in its nature," because the sole purpose and effect of the law is to "set aside a decree of the court . . . and [to] grant[] a new hearing" for those plaintiffs whose causes of action were dismissed as a result of *Lampf* and *Beam*. *See Calder*, 3 U.S. (3 Dall.) at 386, 398 (Iredell, J., dissenting).

tion 27A contravenes the separation of powers principles spelled out by the Court in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), which case establishes that Congress cannot "prescribe a rule for the decision of a cause in a particular way" where "no new circumstances have been created by legislation." 80 U.S. at 146-47.[20] Article III of the Constitution grants to the courts alone the power to decide "cases" and "controversies," and thus precludes legislative direction to reach specific results in designated cases.[21]

Moreover, by demanding that the courts—including this Court—ignore the otherwise dispositive rulings in *Lampf* and *Beam*, Section 27A directly invades core judicial functions. Section 27A requires that the courts resolve the timeliness of pending and dismissed Section 10(b) cases by assuming that it still is June 19, 1991, and that the rulings in *Lampf* and *Beam* have not been rendered. Yet Congress cannot require that the courts—including this Court—resolve certain cases on the basis of counterfactual assumptions, any more than it can in-

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[20] This Court recently described Section 27A as simply "limiting the retroactive effect of our decision . . . an acknowledgement of the section 10b-5 action without any further expression of legislative intent to define it." *Musick*, —— U.S. at ——, 61 U.S.L.W. at 4522-23.

[21] That Congress intended to dictate results in certain cases is clear from the narrow scope of persons affected by Section 27A. Congress did not provide that *all* persons who relied upon pre-*Lampf* circuit law should be entitled to have their claims reinstated. For example, individuals who relied upon limitations periods prescribed by existing circuit law, but did not file lawsuits on or before June 19, 1991, derive no benefit from Section 27A. By limiting the law's effects to those who filed suit prior to *Lampf* (and whose rights had been championed throughout the legislative process), Congress made it clear that it was addressing only a specific series of cases and demanding that the lower courts allow those cases to proceed even though they would be time-barred by the Court's decisions in *Lampf* and *Beam*.

struct courts to ignore historical facts or disregard certain statutes.

This invasion of the judicial function is especially acute where, as here, Congress dictates not that the courts apply a different fixed rule—for example, a three year statute of limitation as opposed to a one year statute of limitation—but that they adopt a particular decisional approach to an issue, as if certain decisions of this Court were never rendered. Such direct legislative intrusion into the manner in which the courts exercise their Article III judicial functions is precisely the legislative prescription of "a rule for the decision of a cause in a particular way" forbidden by the separation of powers doctrine.

To be sure, Congress has the power to "overturn" this Court's statutory rulings by establishing new law. If Congress disagrees with *Lampf*, it is free to alter the statute. Unless and until *Lampf* is "overturned," however, Congress does not have the power to instruct this Court to disregard its own ruling, to instruct the lower courts to ignore otherwise determinative rulings of this Court, or to adopt a judicial methodology—in this case borrowing of state statutes of limitations—explicitly rejected by the Court, based upon its interpretation of the intent of the 1934 Congress. These Article III judicial matters are beyond congressional authority under Article I.

B. The Decision Below Misconstrues *Beam* And *Seattle Audubon*, Thereby Creating A Conflict Between Those Cases And Separation Of Powers Principles.

The majority opinon below, and companion decisions in other circuits sustaining Section 27A against constitutional challenge,[22] not only have failed to appreciate the

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[22] *Anixter v. Home-Stake Production Co.*, 977 F.2d 1533 (10th Cir. 1992), *cert. denied sub nom. Cross v. Thorner*, —— U.S. ——, 113 S. Ct. 1842 (1993); *Berning v. A.G. Edwards & Sons*, 990 F.2d 272; *Gray v. First Winthrop Corp.*, 989 F.2d 1564 (9th Cir. 1993).

serious separation of powers issues discussed above; they have misconstrued this Court's decision in *Robertson v. Seattle Audubon Society*, —— U.S. ——, 112 S. Ct. 1407 (1992) ("*Seattle Audubon*"), so as to validate virtually any congressional command which takes a legislative form, and have found that the judicial retroactivity principles set forth in *Beam* are subject to suspension (and presumably even eradication) by Congress. Taken together, these misconstructions of recent Supreme Court rulings create a serious conflict with traditional separation of powers jurisprudence.

The lower courts mistakenly have found that *Seattle Audubon* controls this case, even though the Court in *Seattle Audubon* merely applied the proposition (inapposite here) that once Congress makes a change in the underlying law following a lower court decision, appellate courts may apply the altered law to pending cases. —— U.S. at ——, 112 S. Ct. at 1413-14; *cf. United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801) (an intervening treaty affected the disposition of a captured warship that a lower court had condemned as "prize"). The Court resolved *Seattle Audubon* by holding that Congress indeed had made substantive prospective changes in the underlying statute, *see* —— U.S. at ——, 112 S. Ct. at 1413 ("subsection (b)(6)(A) compelled changes in law, not findings or results under old law"), 1414 (provision in question affected pending case "by effectively modifying the provisions at issue in those cases"), which changes properly were applied to pending cases.

It does not follow, however, that when Congress makes absolutely no prospective change in the provisions of the underlying statute—as is true with Section 27A—it remains free to enact a purely retrospective statute requiring that the courts ignore an otherwise determinative Supreme Court interpretation of that statute. Under the reasoning in *Seattle Audubon*, the substantive law which

should be applied to this case, and to all implied private actions under the 1934 Act, is exactly the same; there is no "new law" to be applied to any 1934 Act case, as none of the underlying statutory provisions in the 1934 Act have been changed. Congress has no authority to legislate retroactive exceptions to the application of the laws of the United States, even if it has the power to alter those laws prospectively.[23]

The decision below and other appellate decisions have eschewed this common sense reading of *Seattle Audubon* [24] in favor of construing that case to validate "an act of Congress that is intended to affect litigation *so long as it changes the underlying substantive law in any de-*

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[23] This follows as well from the basic proposition that this Court is the final arbiter of the intent of a previous Congress, and its decisions resolve, once and for all, the meaning of a statute at the time of its decision. *See, e.g., United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 34 (1982); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 354 n.39 (1977); *see also United Air Lines, Inc. v. McMann*, 434 U.S. 192, 200 n.7 (1977) ("[l]egislative observations 10 years after the passage of the Act are in no sense part of the legislative history").

Congress has no authority to insist that an erroneous construction of prior law (in this case, circuit law disavowed in *Lampf* as inconsistent with the intent of the 73rd Congress, *see Musick*, —— U.S. at ——, 61 U.S.L.W. at 4523) be applied to pending cases, much less to revivify cases that already have been dismissed, or that may have been settled, on the basis of this Court's definitive construction of the law. *See also Beam*, —— U.S. ——, 111 S. Ct. at 2447 (Souter, J., joined by Stevens, J.) (quoting *Federated Department Stores v. Moitie*, 452 U.S. 394, 410 (1981)) (addressing finality concern raised by relitigation of issues).

[24] The decision below completely failed to appreciate the distinction between purely retroactive legislation and a prospective change in a statute, 971 F.2d at 1573 ("[w]e fail to see the significance of such a distinction"), even though this Court repeatedly has recognized a clear difference between retrospective and prospective legislation. *See, e.g., Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976) ("It does not follow . . . that what Congress can legislate prospectively it can legislate retrospectively.").

tectable way." [25] If this approach is correct, then *Seattle Audubon*—a decision which did not purport to resolve separation of powers issues, —— U.S. at ——, 112 S. Ct. at 1414—has tacitly overruled all of this Court's separation of powers jurisprudence and has rendered *United States v. Klein* a dead letter. Yet *Seattle Audubon* does not overrule *Klein*, either explicitly or implicitly. The Court in *Seattle Audubon* never intimated or held that Congress could enter directly into the judicial sphere at all, much less by dictating that the courts resolve any case on the basis of counterfactual assumptions.

The only construction of *Seattle Audubon* faithful to traditional separation of powers jurisprudence is that Congress does not make a change in the underlying substantive law simply because it couches a command in statutory guise, regardless of whether that rule of law requires reversal of a judgment of this Court or an invasion of core judicial functions. The lower courts' form over substance reading of *Seattle Audubon* is unfaithful to separation of powers doctrine, which clearly condemns legislative attempts to act as a "super-Supreme Court" and exercise judicial functions in legislative guise.[26]

The lower courts similarly have misconstrued *Beam* in almost conscious disregard of separation of powers principles. For example, several appellate courts have reasoned that *Beam* is not constitutionally based and therefore is subject to suspension by the legislature.[27] This

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[25] *Gray v. First Winthrop Corp.*, 989 F.2d at 1570 (emphasis added).

[26] *See Hurtado*, 110 U.S. at 535-36 ("It is not every act, legislative in form, that is law. . . . It must be not a special rule for . . . a particular case . . . thus excluding, as not due process of law, . . . acts reversing judgments . . . legislative judgments and decrees, and other similar special, partial, and arbitrary exertions of power under the form of legislation.").

[27] *Anixter v. Home-Stake Production Co.*, 977 F.2d at 1457; *McCool v. Strata Oil Co.*, 972 F.2d at 1458 n.3; *Gray v. First*

analysis ignores the underlying separation of powers issue, which is whether *Beam's* judicial retroactivity principles are matters within the exclusive purview of the judiciary. The several opinions in *Beam* reflect "that litigants in similar situations should be treated the same, a fundamental component of *stare decisis* and the rule of law generally," [28] inherent in "basic norms of constitutional adjudication," [29] mandated by "the Constitution." [30] *Beam's* rejection of selective prospectivity derives "from the integrity of judicial review, which does not justify applying principles determined to be wrong to litigants who are in or may still come to court." —— U.S. at ——, 111 S. Ct. at 2450 (Blackmun, J., joined by Marshall, J. and Scalia, J.); *see Harper*, —— U.S. at ——, 61 U.S.L.W. at 4667.

Beam establishes that, in our constitutional scheme, the judiciary has the exclusive responsibility for deciding under what circumstances judicial decisions shall be applied to litigants already in the judicial system. This power cannot constitutionally be exercised by Congress, regardless of whether any particular judicial rule for making these decisions is "constitutionally based." *See Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (essential attributes of Article III

Winthrop Corp., 989 F.2d at 1572. *Contra Harper*, —— U.S. at ——, 61 U.S.L.W. at 4667 ("Mindful of the 'basic norms of constitutional adjudication' that animated our view of retroactivity in the criminal context, [*Griffith v. Kentucky*, 479 U.S. 314, 322 (1987)], we now prohibit the erection of selective temporal barriers to the application of federal law in noncriminal cases."). The court below did not even address whether Section 27A was consistent with *Beam*, concentrating solely on *Seattle Audubon* and *Lampf*.

[28] *Beam*, —— U.S. at ——, 111 S. Ct. at 2444 (Souter, J., joined by Stevens, J.).

[29] *Beam*, —— U.S. at ——, 111 S. Ct. at 2449 (Blackmun, J., joined by Marshall, J. and Scalia, J.).

[30] *Beam*, —— U.S. at ——, 111 S. Ct. at 2450 (Scalia, J., joined by Marshall, J. and Blackmun, J.).

powers must remain in the courts).[31] Even temporary legislative suspension of these judicial rules invades Article III and exceeds the authority of Congress under Article I.

If the lower courts are correct, then Congress can overturn rather than suspend *Beam*, ordering the courts—including this Court—to continue to utilize the *Chevron Oil* test (or any other test devised by Congress) in order to determine whether to apply case precedent to litigants within the judicial system. *But see Harper*, —— U.S. at ——, 61 U.S.L.W. at 4666 n.9 (rejecting *Chevron Oil* analysis as inappropriate method for determining choice of law to be applied in the federal courts). Determining whether to apply one rule of law or another to parties in litigation is an essential attribute of deciding Article III "cases" and "controversies." Regardless of whether *Beam* is based on the Constitution *per se*, it thus resolves a question within the exclusive authority of the judiciary, which constitutionally is not subject to revision by the Congress.

The need for clarification of the scope of *Beam* and *Seattle Audubon*, and reaffirmation of the vitality of the separation of powers doctrine, are compelling reasons for issuing a writ of certiorari in this case. Absent prompt clarification by the Court, lower court misconstruction of these important recent rulings will continue and the separation of powers doctrine as enunciated by the Court throughout its history will cease to exist.[32]

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[31] For example, the Constitution surely does not require that the courts read briefs submitted by litigants. Yet even so, Congress surely cannot pass a law forbidding the courts from reading briefs at all, or from reading briefs submitted by certain litigants (*e.g.*, those whose names begin in the latter half of the alphabet) or in a certain class of cases (*e.g.*, defendants in civil rights cases). These are matters within the scope of Article III authority, as are the judicial retroactivity rules established by *Beam*.

[32] *Cf. Harper*, —— U.S. at ——, 61 U.S.L.W. at 4669 (Kennedy, J., and White, J., concurring) ("The critics of the traditional rule

CONCLUSION

A writ should issue to address the fundamental separation of powers questions posed by this case.

Respectfully submitted,

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of full retroactivity were well aware that it was grounded in what one of them contemptuously called 'another fiction known as the Separation of Powers.'" (citation omitted)).

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 91-8938

RUSSELL HENDERSON, MILDRED E. CHAMBERS and CHARLES E. MOORE, Individually and as Class Representatives,
Plaintiffs-Appellants,

v.

SCIENTIFIC-ATLANTA, INC.,
Defendant-Appellee.

Sept. 11, 1992

Before COX, Circuit Judge, CLARK,* and WELLFORD,** Senior Circuit Judges.

COX, Circuit Judge:

The Plaintiffs filed a securities fraud class action against Scientific-Atlanta, Inc. (Scientific) in the Northern District of Georgia. Shortly before trial, the Supreme Court announced its decisions in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,* —— U.S. ——, 111 S.Ct. 2773, 115 L.Ed.2d 321 (1991), and *James B. Beam Distilling Co. v. Georgia,* —— U.S. ——, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991), which changed the applicable statute of limitations for Plaintiffs' suit. In light of these decisions, the district court granted Scientific's motion for summary judgment on the ground that the action was time-barred. On appeal, Plaintiffs

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** Honorable Harry W. Wellford, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

argue that section 27A of the Securities Exchange Act of 1934, which was recently added to the Act, requires the district court to reinstate their action. Scientific, on the other hand, contends that section 27A is unconstitutional. We conclude that section 27A is constitutional and controlling. Accordingly, we vacate the judgment and remand with instructions to reinstate the action.

I. Facts and Procedural History

In September 1988, Russell Henderson filed this action against Scientific on behalf of himself and some 40,000 other investors who purchased Scientific's common stock during the time period beginning on January 1, 1981, and ending on August 31, 1983. The complaint asserts federal claims under section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and rule 10b-5, 17 C.F.R. § 240.10b-5, as well as pendent state-law claims for fraud and misrepresentation. Two other individuals joined the suit as named plaintiffs and class representatives. The class was certified in August 1989. The Plaintiffs allege that they lost over $370 million due to Scientific's fraudulent omissions, misstatements, and misrepresentations that artificially inflated the price of its stock. Scientific denies all allegations of wrongdoing.

Scientific moved for summary judgment on the ground that the Plaintiffs' action was time-barred. Neither section 10(b) nor rule 10b-5 contains a statute of limitations. At that time, for implied private causes of action arising under section 10(b), the law of this circuit directed courts to "borrow" a statute of limitations from state law. *See Smith v. Duff and Phelps, Inc.*, 891 F.2d 1567, 1569-70 (11th Cir.1990). In this case, the district court borrowed from Georgia law and applied a two-year statute of limitations running from the date of discovery. The court concluded that the Plaintiffs' action was timely and rejected Scientific's motion for summary judgment.

The district court then set the case for trial. The parties were still awaiting trial on June 20, 1991, when

the Supreme Court announced its decisions in *Lampf* and *Beam*. In *Lampf*, the Supreme Court rejected the practice of borrowing state statutes of limitations for private causes of action under section 10(b). *Lampf*, —— U.S. at ——, 111 S.Ct. at 2781-82. Instead, the Court held that such actions are subject to a federal one-year/three-year statute of limitations; a private action under section 10(b) must be brought within one year of discovery but no more than three years after the date of the alleged violation. In announcing this new rule, the Supreme Court held that the rule should be retroactively applied to the parties before it and dismissed the plaintiffs' suit as time-barred. *Id.*

In *Beam*, which was announced on the same day as *Lampf*, the Supreme Court held that when the Court applies a new rule to the litigants in a particular case, that rule must be retroactively applied to all other similarly situated litigants. *Beam*, —— U.S. at ——, 111 S.Ct. at 2441. This circuit has recognized that *Beam* requires retroactive application of the new statute of limitations rule announced in *Lampf*. *Lufkin v. McCallum*, 956 F.2d 1104, 1108 (11th Cir.1992).

In light of *Lampf* and *Beam*, Scientific again moved for summary judgment on the ground that the Plaintiffs' action was time-barred. The district court agreed that the action was not timely under the new statute of limitations rule announced in *Lampf*. Accordingly, the district court granted summary judgment in favor of Scientific on the federal securities law claims. The court also dismissed the pendent state-law fraud and misrepresentation claims without prejudice. The Plaintiffs then filed notice of appeal to this court.

While this appeal was pending, Congress enacted the Federal Deposit Insurance Corporation Improvement Act of 1991. Section 476 of that Act amended the Securities Exchange Act of 1934 by adding the following provision:

> Section 27A. (a) Effect on Pending Causes of Action.—The limitation period for any private civil

> action implied under section 10(b) of this Act that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.
>
> (b) Effect on Dismissed Causes of Action.—Any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991—
>
> > (1) which was dismissed as time barred subsequent to June 19, 1991, and
> >
> > (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,
>
> shall be reinstated on motion by the plaintiff not later than 60 days after the date of enactment of this section.

Pub.L. No. 102-242, § 476, 105 Stat. 2236, 2387 (1991). We decline to remand this case to the district court to consider the effect of section 27A because the issue is solely a questoin of law and does not require any additional fact-finding. Moreover, both the Plaintiffs and Scientific have had the opportunity in their briefs and at oral argument to discuss the effect of section 27A on the applicable statute of limitations in this case. *See Howard v. Haddad*, 962 F.2d 328, 330 (4th Cir.1992) (declining to remand case for consideration of the statute of limitations under *Lampf* because the parties fully discussed the issue in their appellate briefs and at oral argument).[1]

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[1] Because Scientific contends that section 27A is unconstitutional, the United States intervened as a matter of right. *See* 28 U.S.C. § 2403(a).

II. Issues on Appeal

1. Whether section 27A of the Securities Exchange Act of 1934 affects the applicable statute of limitations and requires the district court to reinstate the action.

2. Whether section 27A violates the doctrine of separation of powers.

3. Whether section 27A violates the Due Process Clause of the Fifth Amendment.

III. Contentions of the Parties

Scientific contends that the district court's grant of summary judgment should be affirmed. It argues that we should interpret the statute of limitations in section 27A of the Securities Exchange Act of 1934 in a manner consistent with the Supreme Court's decision in *Lampf*. Such an interpretation would avoid the necessity of deciding whether section 27A is constitutional. In the alternative, Scientific claims that section 27A is unconstitutional because it violates both the doctrine of separation of powers embodied in Article III of the Constitution and the Due Process Clause of the Fifth Amendment.

The Plaintiffs argue that section 27A makes their action timely because it reinstates the statute of limitations in existence on June 19, 1991. Contrary to Scientific's suggestion, this court cannot interpret the statute of limitations in section 27A in a manner consistent with the Supreme Court's decision in *Lampf*. In addition, the Plaintiffs and the United States contend that section 27A is constitutional because it neither contravenes separation of powers principles nor violates the Due Process Clause of the Fifth Amendment.[2]

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[2] The Plaintiffs also contend that the district court's grant of summary judgment in favor of Scientific was reversible error on grounds unrelated to section 27A. Because we conclude that section 27A is controlling, we do not address these alternative arguments.

IV. Standards of Review

We review the district court's grant of summary judgment *de novo*. *Twin Construction v. Boca Raton, Inc.*, 925 F.2d 378, 381 (11th Cir.1991). The constitutionality of section 27A was not addressed by the district court. The constitutional issue is subject to plenary consideration by this court.

V. Discussion

A. *Effect of Section 27A*

We begin by addressing Scientific's suggestion that we interpret section 27A of the Securities Exchange Act of 1934 in a manner consistent with the Supreme Court's decision in *Lampf*. *See Communications Workers v. Beck*, 487 U.S. 735, 762, 108 S.Ct. 2641, 2657, 101 L.Ed.2d 634 (1988) (stating that courts should construe federal statutes to avoid serious constitutional questions if such a construction is "fairly possible"). "Nothing in Section [27A] precludes this Court from determining what the appropriate limitations period was for Section 10(b) in light of all the law that existed on June 19 and applying that law to plaintiffs." Appellee's Brief at 16. Scientific points out that other circuits had adopted a federal one-year/three-year statute of limitations as of June 19, 1991. It asks this court to *now* adopt such a statute as the law of the circuit as of June 19, 1991.

Such an action is foreclosed by section 27A itself. Section 27A requires us to apply "the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, *as such laws existed on June 19, 1991*." Pub.L. No. 102-242, § 476, 105 Stat. 2236, 2387 (1991) (emphasis added). On June 19, 1991, the law in this circuit was that the statute of limitations for section 10(b) claims should be borrowed from state law. *Smith v. Duff and Phelps, Inc.*, 891 F.2d 1567, 1569-70 (11th Cir.1990) (rejecting the uniform federal statute of limitations adopted by other circuits).

When Congress stated that the limitation period for these actions shall be the limitation period provided by the laws applicable in the jurisdiction as such laws existed on June 19, 1991, it must be presumed that Congress was aware of the law as it existed *in all the circuits* on that date. This court cannot simply overrule precedent after Congress has codified it.

B. *Separation of Powers*

No court of appeals has yet addressed the constitutionality of section 27A.[3] The district courts that have considered this issue are divided. *Compare Bank of Denver v. Southeastern Capital Group, Inc.*, 789 F.Supp. 1092 (D.Colo.1992), *and TGX Corp. v. Simmons*, 786 F.Supp. 587 (E.D.La.1992) (declaring section 27A unconstitutional), *with Brown v. Hutton Group*, 795 F.Supp. 1307 (S.D.N.Y.1992), *and Bankard v. First Carolina Communications, Inc.*, No 89-8571, 1992 WL 3694, 1992 US. Dist. LEXIS 53 (N.D.Ill. Jan. 3, 1992) (finding section 27A constitutional).

Scientific argues that section 27A violates the separation of powers doctrine because Congress "sought to render . . . [*Lampf*] a nullity as a binding precedent on the lower federal courts. . . ." Appellee's Brief at 20. Assuming this is true, we see nothing wrong in it. The *Lampf* Court was simply interpreting the Securities Exchange Act of 1934. If Congress disagrees with the

[3] In *Henley v. Slone*, 961 F.2d 23 (2d Cir. 1992), for example, the Second Circuit declined to consider the constitutionality of section 27A until the district court determined on remand whether the Plaintiff's action would be timely under the new statute. In another decision, the Second Circuit observed, in dicta, that "[a]lthough the parties have not suggested that section 27A is unconstitutional, we are aware that several district courts have so held, but . . . we are unimpressed by the cogency of their analysis." *Litton Industries v. Lehman Brothers Kuhn Loeb*, 967 F.2d 742, 751 n.6 (2d Cir. 1992). Ultimately, however, the court declined to address the effect of *Lampf* and section 27A because the defendants had failed to raise the statute of limitations as a defense in the district court. *Id.* at 752.

Supreme Court's interpretation, it is free to amend the statute as it sees fit.[4] Indeed, this is how our federal system is designed to operate.

Scientific also argues that Congress did not seek to make new law by adopting section 27A, but rather attempted to force courts to reach an outcome which is contrary to the law.[5] In *Robertson v. Seattle Audubon Society*, —— U.S. ——, 112 S.Ct. 1407, 118 L.Ed.2d 73 (1992), a uninimous Supreme Court squarely rejected this sort of argument. In *Audubon*, various environmental organizations challenged the federal government's policy of allowing timber harvesting from old-growth forests in the Pacific Northwest. In response, the United States Forest Service amended its regulations to restrict harvesting in certain areas. The environmental groups filed suit, claiming that the new regulations were insufficient to protect the northern spotted owl. The Washington Contract Loggers Association and others filed a separate suit, arguing that the regulations were too burdensome. *Id.*

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[4] Section 27A is a classic example of Congress's practice of "overruling" a statutory construction by the Supreme Court. *See also, e.g.*, H.R.Rep. No. 102-40(I), 102d Cong., 1st Sess. 14, *reprinted in* 1991 U.S.C.C.A.N. 549, 552; H.R.Rep. No. 102-40(II), 102d Cong., 1st Sess. 1-3, *reprinted in* 1991 U.S.C.C.A.N. 694-95 (noting that a primary purpose of the Civil Rights Act of 1991 was to overrule several Supreme Court decisions with which Congress disagreed).

[5] Scientific argues that "Congress did not attempt to enact a statute of limitations for Section 10(b) claims or to provide new standards for the courts to apply in deciding what should be the source of law used in borrowing periods of limitations in the absence of an express statutory period. Instead, Congress continued to ask the courts to make those judgments but endeavored to direct them to reach a different result than the law otherwise required in determining the appropriate statute of limitations period for Section 10(b) claims. . . . If the language of Section [27A(a)] compels such a result, it is difficult to conceive of a more intrusive invasion of the judicial power, in violation of the separation of powers principle. For those reasons, this Court should hold that if Section [27A] requires such a result, it is unconstitutional." Appellee's Brief at 20-21.

In response to the litigation, Congress enacted what is known as the Northwest Timber Compromise. The Compromise both expanded and restricted harvesting in the thirteen national forests in Oregon and Washington and other public lands known to contain spotted owls. The Compromise also provided that:

> The Congress hereby determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned *Seattle Audubon Society, et al., v. F. Dale Robertson*, Civil No. 89-160 and *Washington Contract Loggers Assoc., et al., v. F. Dale Robertson*, Civil No. 89-99 (order granting preliminary injunction) and the case *Portland Audubon Society, et al., v. Manuel Lujan, Jr.*, Civil No. 87-1160-FR.

Id. —— U.S. at ——, 112 S.Ct. at 1411 (quoting subsection (b)(6)(A) of the Northwest Timber Compromise).

When the case was first heard by the Ninth Circuit, the court struck down the statute as a violation of separation of powers. *Seattle Audubon Society v. Robertson*, 914 F.2d 1311 (9th Cir.1990). The Ninth Circuit held that the Compromise was unconstitutional because it "does not, by its plain language, repeal or amend the environmental laws underlying this litigation," but rather "directs the court to reach a specific result and make certain factual findings under existing law." *Id.* at 1316. The Supreme Court reversed, concluding that the Compromise did constitute a change in the law underlying the specified litigation: "[R]espondents argue that subsection (b)(6)(a) did not modify old requirements because it deemed compliance with new requirements to 'meet' the old requirements. We fail to appreciate the significance

of this observation." *Audubon*, —— U.S. at ——, 112 S.Ct. at 1414. The Court noted that Congress could have amended the original statute directly but chose not to. Instead, Congress decided that compliance with the special provision of the Compromise would be sufficient to satisfy the existing statute. This had the effect of "modifying" the original statute under the canon of statutory construction that specific provisions modify general ones. *Id.*

The Supreme Court also rejected the contention that the Compromise directed courts to decide cases in a specific way. It noted that the Compromise did not order courts to make any partciular findings of fact. Nor did it "instruct the courts whether any particular timber sales would violate subsections (b)(3) and (b)(5)." *Id.* —— U.S. at ——, 112 S.Ct. at 1413. The Court also pointed out that the challenged language—"Congress hereby determines and directs"—is implicit in any act of Congress. "A statutory directive binds *both* the executive officials who administer the statute *and* the judges who apply it in particular cases—even if (as is usually the case) Congress fails to preface its directive with an empty phrase like 'Congress . . . directs that.'" *Id.* —— U.S. at ——, 112 S.Ct. at 1414. In addition, the Supreme Court dismissed the fact that the Compromise mentioned specific pending cases by name. "To the extent that subsection (b)(6)(A) affected the adjudication of the cases, it did so by effectively modifying the provisions at issue in those cases." *Id.*

Scientific attempts to distinguish *Audubon* on the ground that the Compromise in that case had both retroactive and prospective effect whereas section 27A has only a retroactive effect. *See* Appellee's Supplemental Brief at 7-8. We fail to see the significance of such a distinction. The central issue is whether section 27A violates separation of powers principles by interfering with judicial decision-making. The presence of an additional prospective effect in no way lessens such interference if

it exists at all. Accordingly, we conclude that *Audubon* is controlling in this case.

Like the Compromise at issue in *Audubon*, section 27A does implement a change in the law; it amends the Securities Exchange Act to provide the statute of limitations for private causes of action under section 10(b) that were filed by June 19, 1991. But Congress has not interfered with the judicial process. The Act does not require courts to make any particular findings of fact or applications of law to fact. Any effect on pending cases is solely a result of a change in the underlying law. We therefore hold that section 27A does not violate the doctrine of separation of powers.

C. *The Fifth Amendment*

Scientific's Fifth Amendment challenge to the Act is two-pronged: (1) the Act's retroactive application violates its right to due process because the Act's purpose is not furthered by rational means, and (2) the Act deprives Scientific of equal protection under the law (implicit in the Fifth Amendment's guarantee of due process) because the Act is not rationally related to the achievement of legitimate government purposes since it treats citizens of different circuits differently and distinguishes between persons who filed suit before June 19, 1991, and those who filed suit after that date. We address these two arguments in turn.

1. Due Process

Scientific contends that section 27A is unconstitutional because it denies Scientific due process in violation of the Fifth Amendment. Scientific's argument is premised, at least in part, upon the fact that Congress's intent in enacting section 27A was to direct the outcome of pending litigation. The fact that it has an effect upon pending litigation does not constitute a due process violation. *See International Union of Electrical, Radio and Machine Workers v. Robbins & Myers*, 429 U.S. 229, 243-44, 97 S.Ct. 441, 450-51, 50 L.Ed.2d 427 (1976) (holding that

revival by statute of an action which was already time-barred did not violate due process).

Scientific also maintains that the "statute makes no attempt to define what would be an appropriate limitations period and then to reinstate or otherwise preserve the pending causes of action of claimants who brought suit within that period of limitations." Appellee's Brief at 27. We disagree. Section 27A defines the appropriate statute of limitations for section 10(b) causes of action. Under the statute, the limitations period for an action filed by June 19, 1991, will be the limitations period in effect on that date in that jurisdiction. For subsequent actions, the uniform one-year/three-year statute of limitations announced in *Lampf* will apply. Assuming that Congress approved of *Lampf*'s limitations period, there was no need for further action on the issue except to protect those lawsuits which had already been filed in reliance upon the old law. Contrary to Scientific's assertion, section 27A is a rational means of preserving those lawsuits which were pending prior to *Lampf*.

2. Equal Protection

Because section 27A does not affect a fundamental right or discriminate on the basis of a suspect classification, the statute is due to be upheld so long as it is rationally related to furthering a legitimate governmental interest. *See Vance v. Bradley*, 440 U.S. 93, 96-97, 99 S.Ct. 939, 942-43, 59 L.Ed.2d 171 (1979).

The purpose of section 27A is clear. Congress sought to reinstate those causes of action that were timely when filed, but which were subsequently rendered untimely by the Supreme Court's decision in *Lampf*. *See* Pub.L. No. 102-242, § 476, 105 Stat. 2236, 2387 (1991). *See also* 137 Cong.Rec. S18,624 (daily ed. Nov. 27, 191) (statement of Sen. Bryan) (noting that "*Lampf* changed the rules in the middle of the game for thousands of fraud victims who already had suits pending"); 137 Cong.Rec.

S17,315 (daily ed. Nov. 21, 1991) (statement of Sen. Riegle) (stating that Congress "must take steps to protect those investors who had cases pending prior to [*Lampf*]"). Protecting these litigants from an unexpected change in the law is a legitimate governmental interest, and section 27A is rationally related to that end.

Scientific argues that section 27A "violates the requirements of equal protection implicit, in the Fifth Amendment's guarantee of due process because it creates a legislative scheme under which liability depends on the defendant's residence or where it transacts business—factors that bear no rational relationship to the goals of the 1934 Act or Section [27A]." Appellee's Brief at 23. This argument, however, misstates the effect of section 27A. Liability under the Securities Exchange Act of 1934 does not depend upon the defendant's residence or place of business. Rather, section 27A merely provides that the applicable statute of limitations, which is an affirmative defense, will vary with the jurisdiction in which suit is brought.

There is nothing irrational about varying the applicable statute of limitations for a cause of action from one jurisdiction to another. Indeed, as the Supreme Court noted in *Lampf*, "the usual rule [is] that when Congress has failed to provide a statute of limitations for a federal cause of action, a court 'borrows' or 'absorbs' the *local* time limitation most analogous to the case at hand." *Lampf*, —— U.S. at ——, 111 S.Ct. at 2778 (emphasis added). Furthermore, in the case of section 27A, such a distinction was absolutely necessary because the purpose of the statute was to codify the law in the various circuits as it existed prior to *Lampf* in order to protect litigants' reliance.

Scientific also objects to the fact that section 27A applies only to cases which were filed no later than June 19, 1991. For cases filed after that date, courts must apply the uniform statute of limitations announced in *Lampf*.

Again, such a distinction is rationally related to Congress's objective. Congress is not obligated to aid every potential litigant who may have been harmed by the change in the law following *Lampf*. It is not irrational for Congress to limit its remedy to those individuals who have gone so far as to file suit in reliance upon the existing statute of limitations. These individuals will suffer the most concrete injury because they have expended significant time and effort to bring their action, not to mention substantial funds for attorney's fees and court costs.[6]

VI. Conclusion

We hold that section 27A of the Securities Exchange Act of 1934 is constitutional. Under section 27A, the Plaintiff's action is timely. Accordingly, the district court's grant of summary judgment is VACATED and the case is REMANDED with instructions to reinstate the action.

The district court dismissed the pendent state-law claims because of its holding that the federal claims were untimely. Therefore, the dismissal of the state-law claims is also VACATED.

The case is remanded to the district court for further proceedings.

VACATED and REMANDED WITH INSTRUCTIONS.

WELLFORD, Senior Circuit Judge, dissenting:

The majority is correct in concluding that *Smith v. Duff & Phelps, Inc.*, 891 F.2d 1567, 1569-70 (11th Cir. 1990), established "that the statute of limitations for section 10(b) claims is the period that the forum state applies to the most closely analogous state claim." *Lampf,*

[6] The Plaintiffs estimate that they have invested more than $2 million and 10,000 hours of attorney time in this class action. Appellants' Brief at 8.

Pleva, Lipkind, Prupis & Petrigrow v. Gilbertson, —— U.S. ——, 111 S.Ct. 2773, 115 L.Ed.2d 321 (1991), however, overruled *Smith* and established that § 10(b) "actions are subject to a federal one-year/three-year statute of limitations" as stated by the majority. This new statute of limitations established in *Lampf* is to be retroactively applied. *See Lampf,* —— U.S. at ——, 111 S.Ct. at 2781-82; *James B. Beam Distilling Co. v. Georgia,* —— U.S. ——, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991); *Lufkin v. McCallum,* 956 F.2d 1104 (11th Cir. 1992). When the district court granted summary judgment for defendant based upon the *Lampf Beam* rationale as to limitations and retroactivity, it was correct in light of the then existing case law.

While plaintiffs' ensuing appeal was pending here, Congress enacted the FDIC Improvement Act of 1991 amending the Securities Exchange Act of 1934, and obviously intended to have "effect on pending private causes of action." The apparent legislative purpose of § 27A "was to return to the *status quo* as it existed prior to *Lampf.*" Congress directed that the law that existed immediately before *Lampf* should be applied to pending cases, applying its own principles of retroactivity.

Scientific Atlanta argues that Congress' action violated its due process rights and its interests established under the *Lampf* rule. I concur with the majority in its analysis and rejection of the challenges based upon the Fifth Amendment.

Defendant also challenges the constitutionality of § 27A based upon the Separation of Power doctrine. A number of district courts have considered like challenges and have reached different results. All have recognized that a court should declare a congressional enactment unconstitutional only for the most compelling reasons. Nonetheless, courts have struck down congressional enactments for separation of powers violation. *See e.g., Bowsher v. Synar,* 478 U.S. 714, 106 S.Ct. 3181, 92 L.Ed.2d 583 (1986). Despite

the careful and thoughtful reasoning of the majority in this difficult case, I am persuaded by the collective efforts of what appear to me to be a majority of district courts that have considered this issue.[1] I would find the congressional enactment in controversy, designed to affect pending litigation and to overrule Supreme Court decisions, to be unconstitutional. I am persuaded that Congress infringed upon judicial authority by setting out specific rules of decision in pending cases, such as the instant case, as proscribed in *United States v. Klein*, 80 U.S. (13 Wall.) 128, 20 L.Ed. 519 (1871).

I would affirm the decision of the district court, and accordingly I respectfully disssent.

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[1] A partial list of district court cases that have determined § 27A to be unconstitutional follows:

Johnston v. CIGNA Corp., 789 F.Supp. 1098 (D.Colo. 1992);

Bank of Denver v. Southeastern Capital Group, Inc., 789 F. Supp. 1092 (D.Colo. 1992);

TGX Corp. v. Simmons, 786 F.Supp. 587 (E.D.La. 1992);

Mancino v. Int'l Tech. Corp., No. 89-7244-RMT, 1992 WL 114436 (C.D.Cal. Mar. 10, 1992);

In re Brichard Sec. Litig., 788 F.Supp. 1098 (N.D.Cal. 1992);

Abrams & Wofsy v. Renaissance Investment Corp., Nos. 1:87-cv-1931-WCO, 1:87-cv-1962-WCO, 1:87-cv-2074-WCO, 1:87-cv-2454-WCO (N.D.Ga. July 21, 1992);

In re Prudential-Bache Energy Income Partnerships Sec. Litig., No. 888, 1992 WL 142575 (M.D.La. June 9, 1992);

Rosenthal v. Dean Witter Reynolds, Inc., No. 91-F-591 (D.Col. June 15, 1992);

Pacific Mutual Life Ins. Co. v. First Republicbank Corp., No. 3:91-CV-0441-H (N.D.Tex. July 13, 1992);

Dulude v. Cigna Sec., Inc., No. 90-CV-72191-DT (E.D.Mich. May 14, 1992).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 1:88-cv-2208-RLV

RUSSELL HENDERSON, *et al.*,
Plaintiffs,

vs.

SCIENTIFIC-ATLANTA, INC.,
Defendant.

ORDER

[Filed September 30, 1991]

Pending before the court is the defendant's Motion for Leave to File a Motion for Judgment on the Pleadings in Light of the Supreme Court's Decision in Lampf Pleva.[1]

I. DISMISSAL OF THE PLAINTIFFS' FEDERAL CLAIMS AS TIME BARRED

The defendant, Scientific-Atlanta, Inc. (hereinafter "Scientific-Atlanta"), moves the court for judgment on the pleadings as to the plaintiffs' Rule 10b-5 claim in light of the recent United States Supreme Court decision in

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[1] When the defendant filed its motion for leave, it also submitted its motion for judgment on the pleadings. Since both sides have extensively briefed the merits of the motion for judgment on the pleadings, the court will also address the merits of that motion. It would certainly be an injudicious use of the court's and the parties' resources for this court simply to grant the motion for leave and then to require that all briefs addressing the merits be refiled and resubmitted. At the hearing conducted on August 26, 1991, the parties raised no objection to the court's considering the merits of the motion for judgment on the pleadings without the necessity of refiling all the briefs; indeed, counsel's arguments at that hearing addressed almost exclusively the merits of the motion for judgment on the pleadings.

Lampf, Pleva, Lipkind, Prupis & Petrigrow v. Gilbertson, —— U.S. ——, 111 S.Ct. 2773 (1991). Both parties agree that in *Lampf* the Court changed the law governing the applicable statute of limitations for federal securities actions brought pursuant to Rule 10b-5. The Supreme Court held that all claims litigated pursuant to Section 10(b) and Rule 10b-5 must be filed within one year after the discovery of the facts constituting the violation but no later than three years after the violation. Moreover, the Supreme Court also held that the plaintiff's case in *Lampf* should be dismissed as time barred, clearly applying the new statute of limitations to the parties before the court.

However, the parties in the instant matter disagree as to whether the Supreme Court's decision should be read to mandate automatic retroactive application of the new statute of limitations to all other similarly situated federal securities cases pending as well. Scientific-Atlanta argues that retroactive application is appropriate and that since it is undisputed that the plaintiffs brought their Rule 10b-5 claim more than three years after any alleged violation, the plaintiffs' claim in the instant matter is time barred. Scientific-Atlanta also contends that should the court dismiss the plaintiffs' Rule 10b-5 claim as untimely, the court should dismiss the plaintiffs' state law fraud claims for lack of subject matter jurisdiction pursuant to United Mine Workers v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130 (1966).

The plaintiffs contend that while the Supreme Court applied the new statute of limitations to the parties before the Court in *Lampf,* the Court did not hold that the new statute of limitations would be retroactively applicable to all cases currently pending. The plaintiffs contend that Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S.Ct. 349 (1971), is still the controlling decision in guiding case by case analysis of retroactivity whenever statutes of limitation are at issue and that this court must employ

the *Chevron Oil* test to determine whether the new statute of limitations applies to the parties in the instant matter.[2]

While *Lampf* arguably did not resolve the issue[3], the Supreme Court's decision in James B. Beam Distilling Company v. Georgia, —— U.S. ——, 111 S.Ct. 2439 (1991) [hereinafter *Jim Beam*], decided the same day as *Lampf* makes unmistakable the Court's intent with regard to the full extent of retroactive application of a new rule once the court makes a determination that a new rule is applicable to the litigants before the court.

In *Jim Beam*, the Court squarely faced the issue of modified or selective prospectivity, i.e., whether in the civil context a court may apply a new rule in the case in which it is announced yet return to the oldrule with respect to all other cases arising on facts predating the announcement of the new rule. The Supreme Court explicitly rejected modified or selective prospectivity in the civil context as it had in the criminal context in Griffin v. Kentucky, 479 U.S. 314, 107 S.Ct. 708 (1987). The Court's opinion in *Jim Beam* clearly establishes a per se rule that if in a particular case a court should apply a new rule to the parties before it, all parties litigating similar pending claims will be bound by the new rule.

In the *Jim Beam* case, Georgia had imposed an excise tax on imported liquor at a rate double that imposed on liquor manufactured from Georgia grown products. In

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[2] *Chevron Oil* held that a decision which results in a new rule of law will be applied completely prospectively where it displaces a principle of law on which reliance was reasonably placed and where prospectivity is warranted by its effect on the operation of the new rule and by the inequities which could result from retroactive application. *See Chevron Oil*, 404 U.S. at 106-07, 97 S.Ct. at 355.

[3] Both Justice Souter and Justice White make reference in their opinions to the fact that there is no civil precedent for modified retroactivity.

1984 the Supreme Court had in 1984 [sic] held that a similar Hawaii law violated the Commerce Clause. *See* Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 104 S.Ct. 3049 (1984). James B. Beam Distilling Company subsequently filed an action in a Georgia state court seeking a refund of taxes it had paid under Georgia's law for 1982, 1983, and 1984 based upon the tax statute's unconstitutionality in light of *Bacchus*. The Superior Court of Fulton County declared the tax unconstitutional under the *Bacchus* decision, but the court, relying on *Chevron Oil,* did not apply its ruling retroactively and denied the petitioner's refund request. The Georgia Supreme Court affirmed the trial court.

The Supreme Court granted certiorari and held that since the Court in *Bacchus* had applied its newely announced decision to the parties before the Court, the Court's action necessarily required that full retroactive application of the newly announced decision be given to all other similarly situated litigants as well. While the various justices constituting the majority in *Jim Beam* disagreed theoretically as to why the Court should reach the decision it did, a clear majority of the justices agreed that in the civil context, selective or modified prospectivity (as a choice of law) should be rejected.

The plaintiffs attempt in various ways to distinguish the facts of the *Jim Beam* case from the facts of the matter before this court. The plaintiffs argue that *Jim Beam was not a class action but a constitutional challenge to a state tax and that Jim Beam Distilling* did not involve the adoption of a limitations period. However, an open-eyed reading of the *Jim Beam* opinion and an objective review of the principles undergirding the decision, as well as consideration of subsequent actions taken by the Supreme Court, mandate the conclusion that these facts do not constitute distinctions that make a difference in the court's analysis of the issue presented by the defendant's motion in this case.

First, the principles upon which the Court based its decision in *Jim Beam* are equally relevant to claims arising under statutory and constitutional law, to those claims pending on direct review as well as to those on collateral review, and to class actions as well as to non-class actions. Justices Souter and Stevens opined that principles of equality and stare decisis demand full retroactive application of a new rule once a court has decided and applied a new rule of law in the case in which it is announced. Justice White concurred in the judgment of the Court based on principles of equity. He declared that since there is "no precedent in civil cases applying a new rule to the parties in the case but not to others similarly situated, and *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987), having overruled such a practice in criminal cases . . . I agree that the petitioner here should have the benefit of *Bacchus*, just as Bucchus Imports did."

Justices Blackmun, Scalia, and Marshall concurred in the judgment of the court based on principles of constitutional adjudication. Those three Justices declared that "this Court's function in articulating new rules of decision must comport with its duty to decide only 'cases' and 'controversies'," and

> selective application of new rules violates the principle of treating similarly situated defendants the same. . . . This rule, which we have characterized as a question of equity, is not the remedial equity that the dissent seems to believe can trump the role of adjudication in our constitutional scheme. . . . It derives from the integrity of judicial review, which does not justify applying principles determined to be wrong to litigants who are in or may still come to court. We fulfill our judicial responsibility by requiring retroactive application of each new rule we announce.
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> *Jim Beam*, —— U.S. at ——, 111 S.Ct. at 2449, 2450.

These principles command the identical outcome regardless of how a case is framed. Moreover, the Court is explicit that the principles outlined in *Jim Beam* outweigh the concerns reflected in the "Chevron Oil test," which the plaintiffs urge this court to employ, and that the test is irrelevant to a determination of whether a new rule should apply to cases not final at the time of the decision announcing the new rule. This court is not free to engage in any balancing of the equities (as set forth in *Chevron Oil*) in ruling on the defendant's motion for judgment on the pleadings. The language of Justice Souter's opinion reflects no ambiguity.

> Nor, finally, are litigants to be distinguished for choice-of-law purposes on the particular equities of their claims to prospectivity: whether they actually relied on the old rule and how they would suffer from retroactive application of the new. It is simply in the nature of precedent, as a necessary component of any system that aspires to fairness and equality, that the substantive law will not shift and spring on such a basis. To this extent, our decision here does limit the possible applications of the *Chevron Oil* analysis, however irrelevant *Chevron Oil* may otherwise be to this case. Because the rejection of modified prospectivity precludes retroactive application of a new rule to some litigants when it is not applied to others, the *Chevron Oil* test cannot determine the choice of law by relying on the equities of the particular case. . . . *Once retroactive application is chosen for any assertedly new rule, it is chosen for all others who might seek its prospective application.* The applicability of rules of law are not to be switched on and off according to individual hardship; allowing relitigation of choice-of-law issues would only compound the challenge to the stabilizing purpose of precedent posed in the first instance by the very development of "new" rules.

—— U.S. at ——, 111 S.Ct. at 2447-48 (emphasis added).

Second, the Supreme Court's actions subsequent to the *Jim Beam* case reveal that the Court's decisions in *Lampf* and *Jim Beam* have resolved the question of whether the newly announced statute of limitations for Rule 10b-5 securities law claims is to be applied retroactively. In Welch v. Cadre Capital, 923 F.2d 989 (2d Cir. 1991), *vacated and remanded sub nom.* Northwest Savings v. Welch, —— U.S. ——, 111 S.Ct. 2882 (1991), the Second Circuit considered whether its adoption of a uniform federal limitations period for Section 10b claims should apply retroactively. The court engaged in a *Chevron Oil* analysis, assuming that it remained valid for examining retroactivity issues within the context of statutes of limitations in civil matters. The Second Circuit found that based upon its *Chevron Oil* analysis, the newly announced rule should not apply retroactively.

On June 28, 1991, the Supreme Court granted a petition for a writ of certiorari in that case, vacated the judgment, and remanded to the Second Circuit for further consideration in light of *Lampf* and *Jim Beam*. Although the plaintiffs contend that had the Supreme Court been in agreement that *Lampf* automatically applied retroactively to all pending cases, *Welch* would have been simply reversed, and that the failure to do so evidences the continuing need for a case-by-case analysis by lower courts applying *Chevron Oil* factors, this court notes that it is equally obvious that the Supreme Court vacated and remanded the case in order to spare the Second Circuit a reversal allowing them to correct their holding in light of recently announced decisions.

Moreover, this court agrees with the defendants that if the plaintiffs were correct about the Court's intent and that courts were still free to conduct a *Chevron* Oil analysis, there would have been no basis for remanding *Welch* so that the Second Circuit could do again what it had

already done, which is to conduct a *Chevron Oil* analysis. This court also agrees with the defendant that by vacating the Second Circuit's decision in *Welch* and remanding the case for reconsideration of the retroactivity issue in light of both the *Lampf* and *Jim Beam* decisions, the Supreme Court made it perfectly clear that *Jim Beam* controls any retroactivity analysis of the new rule adopted in *Lampf*. This court is convinced that *Lampf* and *Jim Beam*, not *Chevron Oil*, must hereinafter guide this court's analysis in determining whether a newly announced statute of limitations must be retroactively applied to all pending cases which might seek prospective application of the new rule.

Other courts which have considered the retroactive effect of *Lampf* have reached the same conclusion. *See* Boudreau v. Deloitte, Haskins & Sells, 1991 U.S. App. LEXIS 18799 (8th Cir. August 16, 1991); Anixter v. Home-stake 1971 Program Operating Corp., 1991 U.S. App. LEXIS 16146 (10th Cir. July 22, 1991.

The plaintiffs also contend that even if the court should find that the new rule established by the *Lampf* decision is applicable to their claim, the *Lampf* decision violates both the federal and Georgia constitutions; therefore, the plaintiffs request that this court grant them leave to amend their complaint in order to set forth various constitutional challenges to the application of *Lampf* or 15 U.S.C. § 78i(2) to these plaintiffs. Since this court has no authority to rule decisions of the United States Supreme Court unconstitutional (under either the federal or state constitution), the court denies the plaintiffs' request for leave to amend.

Since the court finds that the new statute of limitations relevant to all Rule 10b-5 and Section 10b claims announced in *Lampf* must be applied retroactively to all similarly situated litigants, and in light of the fact that the claimants in this case brought their 10b-5 action more than three years after the alleged violation, the defendant's motion for judgment on the pleadings requesting that

the plaintiffs' federal claims be dismissed as untimely is GRANTED.

II. REQUEST TO AMEND COMPLAINT TO INVOKE DIVERSITY JURISDICTION

The plaintifls urge this court, if it should dismiss their federal claims, not to dismiss their state law fraud claims and either (1) allow them to amend to substitute plaintiffs of diverse citizenship so that the court would have diversity jurisdiction or (2) exercise pendent jurisdiction.

The plaintiffs concede that since both they and Scientific-Atlanta are Georgia citizens, diversity jurisdiction is lacking at this time.[4] Scientific-Atlanta opposes the request to amend and in support of its position relies upon the general rule that diversity jurisdiction is determined solely by the citizenship of the parties at the time the action is commenced. However, the cases cited by Scientific-Atlanta do not support such a strict, inflexible application of the rule.

The two primary cases relied upon by Scientific-Atlanta, Smith v. Sperling, 354 U.S. 91, 77 S.Ct. 1112 (1957), and Anderson v. Watts, 138 U.S. 694, 11 S.Ct. 449 (1891), are not controlling in the instant case. In *Anderson* dual executors alleged that they were both citizens of New York and brought a diversity action against defendants who they alleged to be citizens of Florida. When it was subsequently determined that one of the defendants was a citizen of New York, the plaintiffs applied successfully to have the letters testamentary as to one of the executors revoked. They sought to amend their pleadings to drop that executor as a party

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[4] If the named plaintiffs were citizens of a state other than Georgia, diversity jurisdiction would exist in this class action, because, in determining diversity of citizenship for a class action, the courts consider the citizenship only of the named plaintiffs. Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356, 41 S. Ct. 338 (1921).

plaintiff and to aver that the remaining executor was actually a citizen of Great Britain. The Supreme Court accepted the allegation that one executor was not a citizen of New York but of Great Britain but, nevertheless, held that the trial court had no jurisdiction because at the commencement of the suit one of the coexecutors was a citizen of New York as was one of the defendants. The Supreme Court held simply that since diversity jurisdiction did not exist at the commencement of the suit, jurisdiction could not be acquired by the subsequent acts of the plaintiffs.

Similarly, in *Smith v. Sperling*, the Court observed that while the action was pending the plaintiff had died and that a special administrator had been substituted. The Court noted that the administrator was not of diverse citizenship from the defendants but went on to say, "But jurisdiction, once attached, is not impaired by a party's later change of domicile." 354 U.S. at 93, 77 S.Ct. at 1113.

These cases do not hold, as suggested by Scientific-Atlanta, that jurisdiction is tested solely at the time the action is commenced and can never be inquired into afterwards; rather, these cases hold simply that nothing the named parties do after the commencement of the action to change their status affects whether the court has diversity jurisdiction. The Supreme Court has never addressed the precise issue before this court, *viz.*, whether in a class action wherein federal question jurisdiction was originally invoked diverse plaintiffs may be substituted for non-diverse plaintiffs in order to obtain diversity jurisdiction when federal jurisdiction evaporates because of dismissal of the federal claims.

The case most closely on point which this court has been able to find is Hackner v. Guaranty Trust Company of New York, 117 F.2d 95 (2d Cir. 1941). That was apparently a class action brought by holders of certain notes alleging that they had been defrauded. The plain-

tiff subsequently sought to amend their complaint to add two other note holders as named plaintiffs. Without accepting the amendment, the court granted the defendants' motion to dismiss the action for lack of diversity jurisdiction.

The defendants did not contend that complete diversity of citizenship was lacking between the plaintiffs and the defendants but alleged that the amount in controversy did not exceed $3,000. The Court of Appeals determined that none of the claims of the original plaintiffs exceeded the jurisdictional amount of $3,000 and that the claim of only one of the proposed plaintiffs exceeded $3000.

The Court of Appeals held that the trial court acted properly in dismissing the claims of all those plaintiffs who claims did not meet the jurisdictional amount. However, the court also held that the trial court had erred in refusing to allow the complaint to be amended to add a plaintiff whose claim exceeded the jurisdictional amount:

> Since she alleges grounds of suit in the federal court, the only question is whether or not she must begin a new suit again by herself. Defendants' claim that one cannot amend a nonexistent action is purely formal in the light of the wide and flexible content given to the concept of action under the [Federal Rules of Civil Procedure]. Actually she has a claim for relief, an action in that sense; as the Supreme Court pointed out, there is no particular magic in the way it is instituted. . . . Hence no formidable obstacle to a continuance of the suit appears here, whether the matter is treated as one of amendment or of power of the court to add or substitute parties, Federal Rule 21, or of commencement of a new action by filing a complaint with the clerk, Rule 3. In any event we think this action can continue with respect to Eastman without the expense of a new

> suit, which at long last will merely bring the parties to the point where they now are.
>
> 117 F.2d at 98.

The rationale expressed by the Second Circuit in *Hackner*, has never been rejected by the Eleventh Circuit and, indeed, that case has been cited with approval by the former Fifth Circuit.

In Summit Office Park, Inc. v. United States Steel Corp., 639 F.2d 1278 (5th Cir. 1981), the Fifth Circuit dealt with the situation wherein a plaintiff had brought an antitrust suit against numerous defendants on behalf of itself and other class members who were indirect purchasers of the defendant's products. The district court granted the defendants' motion for summary judgment on the basis of a Supreme Court decision entered subsequent to the filing of the action which barred antitrust claims by indirect purchasers. In its order of dismissal, the district court also struck an amended complaint which attempted to substitute direct purchasers as parties plaintiff and as representatives of a new and different class of direct purchasers.

The Fifth Circuit affirmed the dismissal, stating:

> Here the original plaintiff was left with no cause of action upon which it could recover as the result of an intervening Supreme Court decision. There was no way in which the plaintiff could properly amend the complaint to give it a cause of action. Plaintiff had no identity of interest with either the new proposed plaintiffs, or the new class named in the complaint or their cause of action. It is clear that the new cause of action which the new proposed amended complaint attempted to insert could not benefit the original plaintiff.
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> 639 F.2d at 1282 (footnote omitted).

In commenting on the *Hackner* decision the Fifth Circuit seemed to agree with the rationale and analysis in

Hackner but simply distinguished the facts of that case. The Fifth Circuit observed as follows:

> Although at first glance [*Hackner*] appears similar to the present suit there exist fundamental differences. As pointed out in *National Maritime Union [of America v. Curan,* 87 F. Supp. 423 (S.D.N.Y. 1949)], all the named plaintiffs in *Hackner* including the new plaintiff, had claims identical in substance. 87 F. Supp. at 427. The claims differed only in the jurisdictional amount sought for their individual injuries. Neither the class nor the cause of action was changed in the amended complaint. The original plaintiffs had valid claims, which, as members of the class they originally proposed, they could still recover upon in the new complaint. Therefore, in *Hackner*, both the original named plaintiffs and the class they represented continued to have a stake in the outcome of the same controversy. Thus, they had standing to amend. In the instant case, the change in plaintiffs was accompanied by a change in substance; there is a new cause of action. In addition, the amended complaint substitutes not only a new plaintiff but also a totally new class. Here, neither the original named plaintiff nor any member of the original class continues to have any stake in the case. They are precluded from recovery and lack standing to amend.
>
> 639 F.2d at 1283-84 (footnote 12).

In the instant case, as in *Hackner*, neither the class nor the cause of action would be changed by allowing diverse plaintiffs to be substituted for the non-diverse plaintiffs. Furthermore, both the original named plaintiffs and the class they represented would continue to have a stake in the outcome of the controversy. Consequently, as the Fifth Circuit recognized in *Summit Office Park*, they would have standing to amend the complaint.

Further evidence of the fact that Scientific-Atlanta's interpretation of the rule is not as absolute as it urges is the fact that it is generally accepted that a district court can drop a non-diverse party whose presence is not essential to the suit to preserve and perfect diversity jurisdiction. *See* F. & H. R. Farman-Farmaian Consulting Engineers Firm v. Harza Engineering Co., 882 F.2d 281 (7th Cir. 1989); Local Union 598 v. J. A. Jones Construction Co., 846 F.2d 1213, *aff'd*, 488 U.S. 81, 109 S.Ct. 210 (1988); Aetna Casualty and Surety Co. v. Hillman, 796 F.2d 770 (5th Cir. 1986); Othman v. Globe Indemnity Co., 759 F.2d 1458 (9th Cir. 1985); Stockman v. LaCroix, 790 F.2d 584 (7th Cir. 1986).

Determining that it has the power and authority to allow the plaintiffs to substitute diverse plaintiffs does not end the court's inquiry, however, for the court must now determine whether the plaintiffs' claims meet the jurisdictional amount. Both sides agree that the claims of the individual class members cannot be aggregated to meet the jurisdictional amount but, instead, each member of the class must satisfy the jurisdictional amount requirement; however, the parties disagree as to what the jurisdictional amount is.

In 1988, Congress amended the diversity statute, 28 U.S.C. § 1332(a), and raised the jurisdictional amount from $10,000 to $50,000 for actions commenced after May 18, 1989. The plaintiffs contend that this amendment is inapplicable to the instant case because this case was filed prior to March 19, 1989. However, this action was commenced as a federal question case wherein the court would exercise its pendent jurisdiction over the state fraud claims. Because this court's diversity jurisdiction was not invoked at the time of the filing of this complaint, this court holds that the diversity action would not be "commenced" until the court allows the complaint to be amended to substitute diverse plaintiffs for the non-diverse plaintiffs. Consequently, the applicable jurisdic-

tional amount is $50,000, and for this case to proceed there would have to be an allegation that each class member's claims exceed $50,000.

Because there are approximately 40,000 class members the plaintiffs would have to allege compensatory and punitive damages in excess of $2 billion. The plaintiffs' largest damages estimate is $371,200,000, and in their original complaint, the plaintiffs requested punitive damages "in excess of $50,000,000.00." To meet the jurisdictional amount, the plaintiffs would have to have requested punitive damages in excess of $1.6 billion in order for the punitive damages and compensatory damages to exceed $2 billion.

This court recognizes that punitive damages proffered for the purpose of achieving the jurisdictional amount should be carefully examined. *See* Zahn v. International Paper Co., 469 F.2d 1033, 1033 n.1 (2d Cir. 1972), *aff'd*, 414 U.S. 291, 94 S.Ct. 505 (1973); Saval v. BL Limited, 710 F.2d 1027 (4th Cir. 1983). The only instance of which this court is aware in which the punitive damages awarded was anywhere near $1.6 billion was the $11.12 billion judgment obtained by Pennzoil Company in its suit against Texaco, Inc. *See* Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 107 S.Ct. 1519 (1987). The facts and circumstances giving rise to that judgment are far different from those in the instant case. The court has been unable to find any other case, and the plaintiffs have cited none, wherein a plaintiff or a class of plaintiffs has received over $1 billion in damages.

This court concludes that the plaintiffs cannot make a good faith allegation that their compensatory and punitive damages in this case would exceed the jurisdictional amount of $2 billion for the class. Consequently, the plaintiffs' request that they be allowed to amend their complaint to substitute diverse plaintiffs for the non-diverse plaintiffs is DENIED because such amendment

would be futile.[5] *See* Foman v. Davis, 371 U.S. 178, 83 S.Ct. 227 (1962).

III. DISMISSAL OF PLAINTIFFS' STATE LAW CLAIMS BASED UPON LACK OF PENDENT JURISDICTION

In determining whether it should exercise pendent jurisdiction, this court is guided by the seminal case of United Mine Workers v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130 (1966). *Gibbs* held that a federal court has the power to adjudicate state claims that are joined with a federal claim which has "substance sufficient to confer subject matter jurisdiction on the court" as long as the state and federal claims "derive from a common nucleus of operative fact." 383 U.S. at 725, 86 S.Ct. at 1138.

In noting that pendent jurisdiction was a doctrine of discretion, not of a plaintiff's right, the Court provided certain guidelines for the district courts to utilize in determining whether to exercise pendent jurisdiction. For example, needless decisions of state law should be avoided, and where the state issues substantially predominate, the state claims may be dismissed without prejudice. Additionally, if there is a likelihood of jury confusion in treating divergent legal theories of relief, that would justify separating state and federal claims for trial, the state claims should be dismissed.

Although this court believes that the unsettled nature of Georgia law with respect to the plaintiff's fraud on the market theory would be a sufficient reason to decline

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[5] The court recognizes that the plaintiffs have not filed a proposed amendment setting forth the damages claimed. Because this court has held that to invoke diversity jurisdiction the plaintiffs would have to allege damages in excess of $2 billion and because this court has further held that such an allegation could not be made in good faith, this court will not require the plaintiffs to go through the meaningless gesture of submitting a proposed amendment for the sole purpose of having the court reject it.

pendent jurisdiction,[6] this court notes that the guidelines provided by the Supreme Court are applicable only if there are pending federal claims. In the instant case the court has dismissed all federal claims. In such a situation, the Supreme Court has greatly restricted the federal court's discretion to hear state claims. "Certaintly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." 383 U.S. at 726, 86 S.Ct. at 1139 (footnote omitted).

The Eleventh Circuit has recognized that "if the federal claims are dismissed prior to trial, *Gibbs* strongly encourages or even requires dismissal of the state claims." L.A. Draper & Son v. Wheelabrator-Frye, Inc., 735 F.2d 414, 428 (11th Cir. 1984). A review of *Wheelabrator-Frye* and related Eleventh Circuit cases reveals that if the federal claims are dismissed prior to trial, a court should retain jurisdiction over the state claims only if the state claims would be time barred if then filed in state court. *See* Roper v. Edwards, 815 F.2d 1474 (11th Cir. 1987); Stein v. Reynolds Securities, Inc., 667 F.2d 33 (11th Cir. 1982).

Since the plaintiffs allege that they were deterred from discovering the alleged fraudulent acts of the defendant until July 1988 and since under such circumstances Georgia's statute of limitations is four years from the date of such discovery, O.C.G.A. §§ 9-3-31, -96, the plaintiffs' claims would not be barred under Georgia law.

Even if the plaintiffs' state law claims would otherwise be time barred at this time, Georgia law provides that if an action is commenced in either a state or federal court within the applicable statute of limitations and is subsequently dismissed without prejudice, it may be recommenced in state court within six months even though the

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[6] Indeed, the Georgia Supreme Court has never recognized this theory.

statute of limitations may have expired during the pendency of the action. O.C.G.A. § 9-2-61. Although this court recognizes that the Georgia appellate courts have not addressed that issue, there appears to be no reason why this code section would not apply to class actions and would, therefore, serve to preserve the state law claims if the statute of limitations has expired during the pendency of this litigation.

For the foregoing reasons this court concludes that it must decline to exercise pendent jurisdiction.

IV. SUMMARY

In summary, the defendant's motion for leave to file a motion for judgment on the pleadings in light of the Supreme Court's decision in *Lampf* and the motion for judgment on the pleadings are GRANTED; the plaintiffs' request for leave to substitute diverse plaintiffs is DENIED; since the court declines to exercise pendent jurisdiction, the plaintiffs' state law claims are DISMISSED without prejudice.

SO ORDERED, this 30th day of September, 1991.

/s/ Robert L. Vining, Jr.
ROBERT L. VINING, JR.
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-8938

RUSSELL HENDERSON, MILDRED E. CHAMBERS and CHARLES E. MOORE, Individually and as Class Representatives,
Plaintiffs-Appellants,

versus

SCIENTIFIC-ATLANTA, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

[Filed February 10, 1993]

Before: COX, Circuit Judge, Clark* and WELLFORD**, Senior Circuit Judges.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules

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* See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable Harry W. Wellford, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible] R. Cox
United States Circuit Judge

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, section 1, of the United States Constitution states:

[*Legislative Powers*]

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Article III, section 1, of the United States Constitution states:

[*Judicial Power, Tenure of Office*]

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during the Continuance in Office.

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1988), states:

§ 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

* * * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commis-

sion may prescribe as necessary or appropriate in the public interest or for the protection of investors.

June 6, 1934, c. 404, Title I, § 10, 48 Stat. 891.

Section 9(e) of the Securities Exchange Act of 1934, 15 U.S.C. § 78i(e) (1988), states:

Persons liable: suits at law or in equity

(e) Any person who willfully participates in any act or transaction in violation of subsections (a), (b), or (c) of this section, shall be liable to any person who shall purchase or sell any security at a price which was affected by such act or transaction, and the person so injured may sue in law or in equity in any court of competent jurisdiction to recover the damages sustained as a result of any such act or transaction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant. Every person who becomes liable to make any payment under this subsection may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment. No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation.

Section 27A of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa-1 (Supp. III 1991), states:

§ 78aa-1. Special provision relating to statute of limitations on private causes of action

(a) Effect on pending causes of action

The limitation period for any private civil action implied under section 78j(b) of this title that was com-

menced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.

(b) Effect on dismissed causes of action

Any private civil action implied under section 78j(b) of this title that was commenced on or before June 19, 1991—

(1) which was dismissed as time barred subsequent to June 19, 1991, and

(2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,

shall be reinstated on motion by the plaintiff not later than 60 days after Dec. 19, 1991.

Section 27A District Court Decisions

First Circuit

Cannistraci v. Dean Witter Reynolds, Inc., 796 F. Supp. 619 (D. Mass. Aug. 26, 1992) (holding constitutional)

Second Circuit

Schell v. Abedon-Butwin Oil Co., No. 89-Civ.-6435, 1993 U.S. Dist. LEXIS 3174 (S.D.N.Y. Mar 15, 1993) (holding constitutional)

Jameson v. Prudential-Bache Sec., No. 89-Civ.-1043, 1993 U.S. Dist. LEXIS 2477 (S.D.N.Y. Mar. 3, 1993) (holding constitutional)

Lawrence v. Cohn, 816 F. Supp. 191, 1993 U.S. Dist. LEXIS 2119 (S.D.N.Y. Feb. 23, 1993) (holding constitutional)

In re Integrated Resources Real Estate Limited Partnerships Sec. Litig. 815 F. Supp. 620 (S.D.N.Y. 1993) (holding constitutional)

Schick v. Ernst & Young, 808 F. Supp. 1097 (S.D.N.Y. 1992) (holding constitutional)

Aquilio v. Meltzer, No. 90-CV-45, 1992 U.S. Dist. LEXIS 17425 (N.D.N.Y. Nov. 12, 1992) (holding constitutional)

In re First American Center Sec. Litig., 807 F. Supp. 326 (S.D.N.Y. 1992) (holding constitutional)

RAM Investment Assocs. v. Citizens Fidelity Bank & Trust Co., No. 91-Civ.-3617, 1992 WL 240594 (S.D.N.Y. Sept. 16, 1992) (holding constitutional)

In re Crazy Eddie Sec. Litig., 802 F. Supp. 804 (E.D.N.Y. 1992) (holding constitutional)

Ades v. Deloitte & Touche, 799 F. Supp. 1493 (S.D.N.Y. 1992) (holding constitutional)

Duke v. Touche Ross & Co., No. 90-Civ.-5610, 1992 WL 197412 (S.D.N.Y. Aug. 4, 1992) (holding constitutional)

Barr v. McGraw-Hill, No. 87-Civ.-6259, 1992 U.S. Dist. LEXIS 11408 (S.D.N.Y. July 31, 1992) (holding constitutional)

Kalmanson v. McLaughlin, McLaughlin, Piven, Vogel, Inc., No. 86-Civ.-9366, 1992 U.S. Dist. LEXIS 11172 (S.D.N.Y. July 27, 1992) (holding constitutional)

Rabin v. Fivzar Assocs., 801 F. Supp. 1045 (S.D.N.Y. 1992) (holding constitutional)

Brown v. Hutton Group, 795 F. Supp. 1307 (S.D.N.Y. 1992) (holding constitutional), *aff'd*, No. 92-7780, Fed. Sec. L. Rep. (CCH) ¶ 97,420, 1993 U.S. App. LEXIS 8624 (2d Cir. Apr. 19, 1993)

Adler v. Berg Harmon Assocs., 790 F. Supp. 1235 (S.D.N.Y. 1992) (holding constitutional)

Axel Johnson, Inc. v. Arthur Andersen & Co., 790 F. Supp. 476 (S.D.N.Y. 1992) (holding constitutional), *appeal pending*, 92-7624 (2d Cir.)

Third Circuit

Maio v. Advanced Filtration Sys., Ltd., 795 F. Supp. 1364 (E.D. Pa. 1992) (holding constitutional), *appeal denied*, No. 92-1595, 1993 U.S. App. LEXIS 11899 (3d Cir. Apr. 19, 1993)

Fourth Circuit

Venturtech II v. Deloitte Haskins & Sells, 790 F. Supp. 574 (E.D.N.C. 1992) (holding constitutional), *aff'd per curiam*, No. 92-1788, 1993 U.S. App. LEXIS 10267 (4th Cir. Apr. 30, 1993)

Fifth Circuit

Dendinger v. First Nat'l Corp., No. 87-4611, 1992 WL 318593 (E.D. La. Oct. 28, 1992) (holding constitutional)

Pacific Mut. Life Ins. Co. v. First Republicbank Corp., 806 F. Supp. 108 (N.D. Tex. 1992) (holding unconstitutional), *appeal docketed*, No. 92-1662 (5th Cir. Aug. 7, 1992)

In re Prudential-Bache Energy Income Partnerships Sec. Litig., No. MDL-888, 1992 WL 142575 (E.D. La. June 9, 1992) (holding unconstitutional)

In re Taxable Mun. Bond. Sec. Litig., 796 F. Supp. 954 (E.D. La. 1992) (holding constitutional)

TGX Corp. v. Simmons, 786 F. Supp. 587 (E.D. La. 1992) (holding unconstitutional), *appeal docketed*, No. 92-3375 (5th Cir. May 28, 1992)

Sixth Circuit

Cali-Ken Petroleum Co., Inc. v. Frank Miller, 815 F. Supp. 216 (W.D. Ky. 1993) (holding constitutional)

Arioli v. Prudential-Bache Sec., Inc., 800 F. Supp. 1478 (E.D. Mich. 1992) (holding constitutional)

Freeman v. Laventhol & Horwath, Civil No. 87-217 (E.D. Ky. Aug. 14, 1992), *appeal pending*, No. 92-6193 (6th Cir.) (holding unconstitutional)

Treiber v. Katz, 796 F. Supp. 1054 (E.D. Mich. 1992) (holding unconstitutional)

Dulude v. Cigna Sec., Inc., No. 90-CV-72191-DT, 1992 WL 281411 (E.D. Mich. May 15, 1992) (holding unconstitutional)

In re Rospatch Sec. Litig., 802 F. Supp. 110 (W.D. Mich. 1992) (holding unconstitutional)

Plaut v. Spendthrift Farm, Inc., 789 F. Supp. 231 (E.D. Ky. 1992) (holding unconstitutional), *appeal docketed*, No. 92-5591 (6th Cir. Apr. 30, 1992)

Ayers v. Sutliffe, Fed. Sec. L. Rep. (CCH) ¶ 96,552, 1992 U.S. Dist. LEXIS 3219 (S.D. Ohio Feb. 2, 1992) (holding constitutional), *appeal docketed*, No. 92-3229 (6th Cir. Feb. 26, 1992)

Seventh Circuit

Fry v. UAL Corp., No. 90-C-0999, 1992 U.S. Dist. LEXIS 11140 (N.D. Ill. July 21, 1992) (holding constitutional)

Cortes v. Gratkowski, 795 F. Supp. 248 (N.D. Ill. 1992) (holding constitutional)

Bankard v. First Carolina Communications, Inc., No. 89-C-8571, 1992 WL 3694 (N.D. Ill. Jan. 6, 1992) (holding constitutional)

Ninth Circuit

Ash v. Dean Witter Reynolds, Inc., 806 F. Supp. 1473 (E.D. Cal. 1992) (holding constitutional)

Lundy v. Morgan Stanley & Co., 794 F. Supp. 346 (N.D. Cal. 1992) (holding constitutional)

In re American Continental Corp. Litig., 794 F. Supp. 1424 (D. Ariz. 1992) (holding constitutional)

Wegbreit v. Marley Orchards Corp., 793 F. Supp. 965 (E.D. Wash. 1992) (holding constitutional)

Gray v. First Winthrop Corp., No. C-90-2600-JPV, 1992 U.S. Dist. LEXIS 15907 (N.D. Cal. May 6, 1992) (holding unconstitutional), *rev'd*, 989 F.2d 1564 (9th Cir. 1993)

Iverson v. Zond Systems, Inc., No. 90-4630, 1992 U.S. Dist. LEXIS 14572 (C.D. Cal. Apr. 27, 1992) (holding constitutional)

Hastie v. American AgriCorp., No. SAVC-89-433 (C.D. Cal. Apr. 20, 1992) (holding constitutional)

Fred Hindler, Inc. v. Telequest, Inc., No. 89-0847, 1992 U.S. Dist. LEXIS 6223 (S.D. Cal. Mar. 31, 1992) (holding constitutional)

In re Britchard Sec Litig., 788 F. Supp. 1098 (N.D. Cal. 192) (holding unconstitutional), *appeal dismissed*, No. 92-15893 (9th Cir. Nov. 18, 1992)

First v. Prudential Bache Sec., Inc., No. CV-91-0047, 1992 U.S. Dist. LEXIS 7782 (S.D. Cal. Mar. 24, 1992) (holding constitutional)

In re Melridge, Inc. Sec. Litig., No. 87-1426, 1992 U.S. Dist. LEXIS 3477 (D. Ore. Mar. 20, 1992) (holding constitutional)

Mancino v. International Technology Corp., No. CV-89-7244-RMT, 1991 U.S. Dist. LEXIS 20025 (C.D. Cal. Sept. 13, 1991) (holding unconstitutional)

Tenth Circuit

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Bank of Denver v. Southeastern Capital Group, Inc., 789 F. Supp. 1092 (D. Colo. 1992) (holding unconstitutional), *appeal terminated*, No. 92-1235 (10th Cir. Oct. 14, 1992)

TGB, Inc. v. Bendis, No. 89-2423, 1992 U.S. Dist. LEXIS 5940 (D. Kan. Mar. 5, 1992) (holding constitutional)

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Eleventh Circuit

Agapitos v. PCM Inv. Co., 809 F. Supp. 939 (M.D. Ga. 1992) (holding constitutional)

Abrams & Wofsy v. Renaissance Inv. Corp., No. 1:87-CV-1931-WCO, Fed. Sec. L. Rep. ¶ 96,884, 1992 WL 206276 (N.D. Ga. Jan. 13, 1992) (holding unconstitutional)

District of Columbia Circuit

Mayer v. Dell, No. 90-0472, 1992 U.S. Dist. LEXIS 3938 (D.D.C. Apr. 2, 1992) (holding constitutional)

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No. 92-2061

In the Supreme Court of the United States

OCTOBER TERM, 1993

SCIENTIFIC-ATLANTA, INC., PETITIONER

v.

RUSSELL HENDERSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether Section 27A(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78aa-1(a) (Supp. III 1991), violates the separation of powers doctrine.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statute involved	2
Statement	2
Argument	6
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Anixter v. *Home-Stake Prod. Co.*, 977 F.2d 1533 (10th Cir. 1992), cert. denied, 113 S. Ct. 1841 (1993)	6
Berning v. *A.G. Edwards & Sons*, 990 F.2d 272 (7th Cir. 1993)	6
Bradley v. *School Bd.*, 416 U.S. 696 (1974)	14
Chevron Oil Co. v. *Huson*, 404 U.S. 97 (1971)	15
Concrete Pipe & Products of California, Inc. v. *Construction Laborers Pension Trust*, 113 S. Ct. 2264 (1993)	10
Cooke v. *Manufactured Homes, Inc.*, No. 93-1005 (4th Cir. July 9, 1993)	6
Cooperativa de Ahorro y Credito Aguada v. *Kidder, Peabody & Co.*, 993 F.2d 269 (1st Cir. 1993)	6
Diamond v. *Lamotte*, 709 F.2d 1419 (11th Cir. 1983)	3
Ernst & Ernst v. *Hochfelder*, 425 U.S. 185 (1976)	3
Friedlander v. *Troutman, Sanders, Lockerman & Ashmore*, 788 F.2d 1500 (11th Cir. 1986)	3
Gray v. *First Winthrop Corp.*, 989 F.2d 1564 (9th Cir. 1993)	6
Harper v. *Virginia Dep't of Taxation*, 113 S. Ct. 2510 (1993)	13, 15
Heckler v. *Mathews*, 465 U.S. 728 (1984)	15
James B. Beam Distilling Co. v. *Georgia*, 111 S. Ct. 2439 (1991)	3, 7, 12, 13, 14

Cases—Continued: Page

Kaiser Aluminum & Chem. Corp. v. *Bonjorno*, 494 U.S. 827 (1990) 11
Lampf, Pleva, Lipkind, Prupis & Petigrow v. *Gilbertson*, 111 S. Ct. 2773 (1991) 3, 4, 7, 15
Musick, Peeler & Garrett v. *Employers Ins.*, 113 S. Ct. 2085 (1993) 7
Pension Benefit Guaranty Corp. v. *R.A. Gray & Co.*, 467 U.S. 717 (1984) 10
Robertson v. *Seattle Audubon Society*, 112 S. Ct. 1407 (1992) 5, 9, 10
Smith v. *Duff & Phelps, Inc.*, 891 F.2d 1567 (11th Cir. 1990) 3
TGX Corp. v. *Simmons*, No. 92-3375 (5th Cir. July 20, 1993) .....
United States v. *Klein*, 80 U.S. (13 Wall.) 128 (1872) .. 6, 9, 10, 12
United States v. *Sioux Nation of Indians*, 448 U.S. 371 (1980) 11, 12
United States v. *Sperry Corp.*, 493 U.S. 52 (1989) 10
United States v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801) 11, 13
Usery v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) .. 10
West Virginia Univ. Hosp., Inc. v. *Casey*, 111 S. Ct. 1138 (1991) 8-9

Constitution, statutes and regulation:

U.S. Const.:
Art. I 12
Art. III 12
Amend. V (Due Process Clause) 5, 10
Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 476, 105 Stat. 2387 4
Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.*:
§ 9(e), 15 U.S.C. 78i(e) 3, 8
§ 10(b), 15 U.S.C. 78j(b) 2, 8, 9, 10, 11, 12
§ 27A, 15 U.S.C. 78aa-1 (Supp. III 1991) 2, 4, 5, 6, 8, 10, 11

Statutes and regulation—Continued: Page

§ 27A(a), 15 U.S.C. 78aa-1(a) (Supp. III 1991) .. 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15
§ 27A(b), 15 U.S.C. 78aa-1(b) (Supp. III 1991) 6, 7
28 U.S.C. 2403(a) 5
17 C.F.R. 240.10b-5 ..... 2, 3, 4

Miscellaneous:

137 Cong. Rec. S18,624 (daily ed. Nov. 27, 1991) 15
Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L.J. 331 (1991) 9

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-16a, is reported at 971 F.2d 1567. The opinion of the district court, Pet. App. 17a-34a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 1992. A petition for rehearing was denied on February 10, 1993. Pet. App. 35a-36a. On May 3, 1993, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including July 2, 1993, and the petition was filed on June 25, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 27A of the Securities Exchange Act of 1934, 15 U.S.C. 78aa-1 (Supp. III 1991), provides:

> (a) *Effect on pending causes of action.*—The limitation period for any private civil action implied under section 78j of this title that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.
>
> (b) *Effect on dismissed causes of action.*—Any private civil action implied under Section 78j of this title that was commenced on or before June 19, 1991—
>
> > (1) which was dismissed as time barred subsequent to June 19, 1991, and
> >
> > (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,
>
> shall be reinstated on motion by the plaintiff not later than 60 days after December 19, 1991.

STATEMENT

1. In September 1988, Russell Henderson filed a private securities fraud class action against petitioner on behalf of purchasers of petitioner's common stock between January 1, 1981, and August 31, 1983. The complaint alleged violations of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Securities and Exchange Commission Rule 10b-5,

17 C.F.R. 240.10b-5, as well as pendent state law claims. Pet. App. 2a.

Petitioner moved for summary judgment, arguing that the statute of limitations had run on the plaintiffs' Section 10(b) claim. To determine the applicable statute of limitations, the district court, in compliance with well-settled circuit law, borrowed from Georgia law a two-year limitations period that ran from the date of discovery.[1] Applying that limitations period, the court determined that the plaintiffs' action was timely. Pet. App. 2a.

While the parties were awaiting trial, this Court issued its decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S. Ct. 2773 (1991), holding that private actions under Section 10(b) are subject to a uniform federal limitations period drawn from Section 9(e) of the 1934 Act, 15 U.S.C. 78i(e). Under that provision, a suit may not be brought more than one year after the fraud is discovered or more than three years after it occurs. 111 S. Ct. at 2782. *Lampf* was decided on June 20, 1991. On the same day, this Court also decided *James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. 2439 (1991), in which it disallowed the use in civil litigation of "selective prospectivity"—the practice of applying a new judicial interpretation of the law in the case in which it

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[1] See *Smith* v. *Duff & Phelps, Inc.*, 891 F.2d 1567, 1569-1570 (11th Cir. 1990); *Friedlander* v. *Troutman, Sanders, Lockerman & Ashmore*, 788 F.2d 1500 (11th Cir. 1986); *Diamond* v. *Lamotte*, 709 F.2d 1419 (11th Cir. 1983). Because the private action under Section 10(b) is an implied cause of action for which Congress had not enacted a statute of limitations, courts had long followed a practice of borrowing a limitations period from other sources. See *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 210 n.29 (1976).

is announced but not applying it to other pending suits.

Based on *Lampf*[2] and *Beam*, petitioner renewed its motion for summary judgment. Applying the limitations period adopted in *Lampf*, the district court agreed that the Section 10(b) claim was time-barred and granted the motion. The plaintiffs appealed. Pet. App. 3a.

2. While the appeal was pending, Congress enacted legislation adding Section 27A, 15 U.S.C. 78aa-1 (Supp. III 1991), to the 1934 Act. See Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 476, 105 Stat. 2387. Subsection (a) of Section 27A makes applicable, to Section 10(b) actions that were pending when *Lampf* was decided, the limitations periods that had prevailed in the particular jurisdiction before *Lampf*. 15 U.S.C. 78aa-1(a) (Supp. III 1991).

Notwithstanding the enactment of Section 27A, petitioner urged the court of appeals to affirm. First, petitioner argued that Section 27A does not require application of the Georgia statute of limitations that had governed before *Lampf*. The court of appeals rejected that claim, holding that the clear language of Section 27A requires application of the pre-*Lampf* limitations period.[3] Pet. App. 6a-7a. Next, petitioner argued that, if Section 27A has the effect of displacing the rule announced in *Lampf*, it is unconstitutional.

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[2] The Court applied its holding adopting a federal limitations period for Section 10(b) actions to the parties in *Lampf* itself. See 111 S. Ct. at 2782; see also *id.* at 2785-2786 (O'Connor, J., dissenting).

[3] Petitioner does not renew its statutory arguments in this Court. Pet. 7 n.8.

The United States intervened pursuant to 28 U.S.C. 2403(a) to defend the constitutionality of Section 27A, Pet. App. 4a n.1, and the court of appeals rejected petitioner's constitutional claims.

The court held that Section 27A(a) does not infringe the separation of powers by interfering with the judgments of courts. The court explained that *Lampf* constituted an interpretation of the Securities Exchange Act of 1934, and Congress had amended the statute in response to *Lampf* to change the governing law. Pet. App. 7a-8a. Thus, "Section 27A is a classic example of Congress's practice of 'overruling' a statutory construction by the Supreme Court." *Id.* at 8a n.4. Relying on *Robertson* v. *Seattle Audubon Society*, 112 S. Ct. 1407 (1992), the court rejected petitioner's contention that Section 27A(a) is an attempt to compel courts "to reach an outcome which is contrary to the law." Pet. App. 8a.

The court of appeals also held that Section 27A(a) does not violate the Due Process Clause. The court concluded that the provision was an appropriate mechanism for Congress to specify the law with respect to limitations periods for cases affected by *Lampf*, and that it did not draw irrational distinctions between litigants in violation of equal protection principles.[4] Pet. App. 11a-14a.

Accordingly, the court of appeals vacated the judgment and remanded with directions to reinstate respondents' Section 10(b) claim.[5] Pet. App. 1a-14a.

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[4] Petitioner does not renew its due process claims in this Court. Pet. (i).

[5] Judge Wellford dissented from the majority's holding on the separation of powers issue. Citing several district court decisions addressing the constitutionality of Section 27A, he

ARGUMENT

Petitioner contends (Pet. 8-20) that Section 27A(a) violates the separation of powers. Six courts of appeals have rejected that claim, and none has accepted it.[6] As petitioner concedes (Pet. 9), there is

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expressed the view that "Congress infringed upon judicial authority by setting out specific rules of decision in pending cases," in violation of *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872). Pet. App. 16a & n.1.

[6] This was the first court of appeals case to reach the constitutional issue. Pet. App. 7a. Since then, Section 27A has been upheld by the other five circuits that have addressed its constitutionality with respect to pending cases. See *Anixter* v. *Home-Stake Prod. Co.*, 977 F.2d 1533 (10th Cir. 1992) (reinstating suit when case was pending by virtue of the fact that 90-day certiorari period had not yet expired), cert. denied, 113 S. Ct. 1841 (1993); *Gray* v. *First Winthrop Corp.*, 989 F.2d 1564, 1571 (9th Cir. 1993) (cases were pending because they had not "completed their journey through the appellate process"); *Berning* v. *A.G. Edwards & Sons*, 990 F.2d 272, 279 (7th Cir. 1993) (case was pending on appeal when Section 27A was enacted); *Cooperativa de Ahorro y Credito Aguada* v. *Kidder, Peabody & Co.*, 993 F.2d 269, 273, n.11 (1st Cir. 1993) (noting that no final judgment of dismissal had been entered by the district court); *Cooke* v. *Manufactured Homes, Inc.*, No. 93-1005 (4th Cir. July 9, 1993), slip. op. 13-14 (limitations issue raised by defendant on appeal as alternative ground for judgment in its favor). The issue is pending in *Axel Johnson, Inc.* v. *Arthur Andersen & Co.*, No. 92-7624 (2d Cir. argued Dec. 21, 1992); *Freeman* v. *Laventhal & Horwath*, Nos. 92-6123 & 92-6191 (6th Cir.); and *Johnston* v. *CIGNA Corp.*, No. 92-1186 (10th Cir.).

In *TGX Corp.* v. *Simmons*, No. 92-3375 (5th Cir. July 20, 1993), the Fifth Circuit sustained the constitutionality of Subsection (b) of Section 27A, which provides for the reinstatement of cases that were finally *dismissed* as time barred prior to the enactment of Section 27A, if the action would have been timely under the law of the jurisdiction prior to *Lampf*. The

no circuit split on the constitutionality of Section 27A(a). Because the decision below is correct and consistent with the decisions of this Court, this Court's review is not warranted.

1. Petitioner argues (Pet. 11-15) that Section 27A(a) invades the judicial province by revising a judgment of this Court and by directing the courts to reach particular results in identified cases. The linchpin of that claim is that Section 27A(a) does not work a change in the substantive law, but simply requires courts to ignore the holdings of *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S. Ct. 2773 (1991), and *James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. 2439 (1991), in specified cases. Pet. 14. Petitioner's premise is incorrect.

As the court of appeals explained, "section 27A does implement a change in the law; it amends the Securities Exchange Act to provide the statute of limitations for private causes of action under section 10(b) that were filed by June 19, 1991." Pet. App. 11a. When Section 27A was enacted, the limitations period

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Sixth Circuit recently reached a contrary result regarding Subsection (b) in *Plaut* v. *Spendthrift Farm*, No. 92-5591 (6th Cir. Aug. 3, 1993). The Solicitor General has authorized the filing of a petition for rehearing *en banc* in *Plaut*. As a result, there is not a conclusive circuit conflict regarding the constitutionality of Subsection (b). In any event, such a conflict would not weigh in favor of certiorari in this case, which involves Subsection (a). As Judge Keith explained in his separate opinion in *Plaut*, the rationale invoked by the Sixth Circuit—that Subsection (b) effectively revises a final federal judgment dismissing a case—does not apply to cases pending on appeal when Section 27A was passed because those cases had not yet become "final." *Plaut* v. *Spendthrift Farm*, No. 92-5591, slip op. at 26-28 (Keith, J., concurring in part and dissenting in part).

for private Section 10(b) claims was the federal rule borrowed from Section 9(e) adopted by this Court in *Lampf*. Section 27A changes the statute of limitations for cases filed prior to *Lampf* by replacing the borrowed federal rule with the limitations period previously applicable in each jurisdiction. As this Court noted in *Musick, Peeler & Garrett* v. *Employers Ins.*, 113 S. Ct. 2085, 2089 (1993), "Congress did no more than direct the applicable 'limitation period for any private civil action implied under section 78j(b) of this title [§10(b) of the 1934 Act] that was commenced on or before June 19, 1991 [the day prior to issuance of *Lampf, Pleva*].'" Thus, Section 27A does not revise a judgment of this Court; it belongs to the large category of statutes that alter the law in response to judicial interpretation.[7] See *West Virginia Univ. Hosp., Inc.* v. *Casey*, 111 S. Ct. 1138, 1154-1155 (1991) (Stevens, J., dissenting); Esk-

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[7] Petitioner suggests that Congress did not change the law because it neither expressed disagreement with the legal analysis in *Lampf* nor altered Sections 10(b) and Section 9(e) of the 1934 Act. Section 27A, however, changes the limitations period read into Section 10(b) by *Lampf*. After enactment of Section 27A, Section 27A (and no other law) prescribes the limitations period for covered Section 10(b) cases. There is no requirement that Congress express disagreement with a court's legal analysis in order to justify reinstatement of a prior interpretation. Nor is there a requirement that Congress specifically repeal or amend a preexisting provision in order to modify the law. In fact, in this case it would have been impossible to do so, given that no express statute of limitations existed for Section 10(b) actions. Petitioner asserts (Pet. 11-12) that Section 27A(a) "creates a retroactive legislative exception to the application of the laws of the United States," but gives no reason why the so-called "exception" that Congress legislated is not part of "the laws of the United States."

ridge, *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L.J. 331, 424-441 (1991) (listing recent examples).

Petitioner claims (Pet. 14) that *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872), supports its contention that Section 27A(a) unconstitutionally directs the courts to reach specific results in particular cases. That contention is incorrect. Section 27A(a) does not tell the courts how to decide the merits of any particular Section 10(b) claim, nor does it "require courts to make any particular findings of fact or applications of law to fact." Pet. App. 11a. The ultimate outcome of any case to which Section 27A(a) applies depends on a court's determination of many issues other than the statute of limitations. Even as to the limitations issue, a court will apply the relevant limitations period in light of the particular circumstances of the case—for example, where tolling principles are applied, by determining when the fraud was or should have been discovered. In sum, the courts, not Congress, determine whether a particular claim is timely and meritorious under Section 27A(a).

In *Robertson* v. *Seattle Audubon Society*, 112 S. Ct. 1407 (1992), the Court rejected a similar *Klein* challenge to a law that altered the standards for complying with certain environmental statutes at issue in pending litigation. Petitioner's claim is foreclosed by the same analysis. Although petitioner asserts (Pet. 14 n.21) that Section 27A(a) directs specific outcomes because it covers only those plaintiffs who had reached the point of filing suit, rather than all potential plaintiffs who had relied on pre-*Lampf* law, Section 27A(a) is far more general in its operation than was the statute at issue in *Robertson*,

which was directed at only two pending cases. 112 S. Ct. at 1411, 1414. And, while the statute in *Robertson* changed the law only by "determin[ing] and direct[ing]" that specified actions would be deemed to satisfy the requirements of particular statutes, 112 S. Ct. at 1413, Section 27A explicitly designates the sources for the applicable limitations period for covered Section 10(b) cases. In light of *Robertson*'s conclusion that the statute in that case modified the underlying law sufficiently to pass muster under *Klein*, Section 27A(a) necessarily satisfies *Klein* as well.

Petitioner asserts (Pet. 16-17) that *Robertson* is distinguishable because the statute in that case had prospective effects, while Section 27A is purely retrospective. *Robertson* holds, however, that when Congress "amend[s] applicable law," its action does not implicate the principles underlying *Klein*. 112 S. Ct. at 1414. Petitioner cites no authority for the view that Congress cannot "amend applicable law," *ibid.*, through a retrospective statute.[8] Here, Congress changed the law retroactively in order to protect the reliance interests of plaintiffs who had timely filed actions under pre-*Lampf* precedents. To achieve that purpose it was not necessary for Congress to enact a

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[8] Petitioner's reliance (Pet. 17 n.24) on *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), is misplaced; that case holds that it is permissible under the Due Process Clause for Congress to legislate retroactively. Accord *Concrete Pipe & Products of California, Inc.* v. *Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2287 (1993); *United States* v. *Sperry Corp.*, 493 U.S. 52, 64 (1989); *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 730 (1984). Nothing in *Usery* suggests that retroactive legislation raises separation of powers concerns.

prospective modification of the relevant limitations period.[9]

Quite apart from the fact that Section 27A(a) works a change in the underlying law, that provision does not violate *Klein* because *Klein* does not cast doubt on the validity of statutes (such as Section 27A(a)) that merely withdraw a procedural defense and allow the adjudication of cases on the merits. In *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 402-407 (1980), the Court rejected a *Klein* challenge to a provision that waived the government's defense of res judicata and allowed further adjudication of a claim, but did not attempt to dictate the outcome of the adjudication. The Court explained that the waiver of "the defense of res judicata so that a legal claim could be resolved on the merits" does not constitute a congressional effort "to control the * * * ultimate

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[9] Petitioner errs in suggesting (Pet. 9, 18) that, if *Robertson* is not read more narrowly, there would be no adequate check on Congress's power to revise this Court's judgments or to invade "core judicial functions." With respect to the revision of judgments, petitioner did not obtain a final and unreviewable judgment from this Court or any other court holding that respondent's Section 10(b) claim against it is time-barred; petitioner's case was still pending on appeal when Section 27A was enacted. Accordingly, this case does not present the issue of whether Congress may announce a rule of law that "requires reversal of a judgment of this Court." Pet. 18. And, with respect to the purported invasion of "core judicial functions," there is no invasion when Congress changes the law applicable to a pending case; since *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), courts have honored the legislative will by applying the new rule. See also *Kaiser Aluminum & Chem. Corp.* v. *Bonjorno*, 494 U.S. 827, 837 (1990) (discussing standards for determining whether new rule is applicable to a pending case).

decision of that claim," 448 U.S. at 405, and "is distinguishable from the proviso to this Court's appellate jurisdiction held unconstitutional in *Klein*," *id.* at 407. Here, as in *Sioux Nation*, Congress has not attempted to determine the outcome of litigation between private parties involving Section 10(b); it has left the merits for adjudication by the courts. Because Section 27A(a) does not "prescribe a rule for the decision of a cause in a particular way," *Klein*, 80 U.S. at 146, it does not transgress the limitations described in *Klein*.

2. Petitioner also argues (Pet. 18-20) that Section 27A(a) unconstitutionally overrules the Court's determination that its decision in *Lampf* should be applied retroactively. Petitioner contends that, under *James B. Beam Distilling Co.* v. *Georgia*, *supra*, "the judiciary has the exclusive responsibility for deciding under what circumstances judicial decisions shall be applied to litigants already in the judicial system." Pet. 19. Accordingly, petitioner concludes (Pet. 20) that Section 27A(a) interferes with the Article III powers of this Court and exceeds Congress's authority.

Whatever limits may constrain Congress's power to affect the retroactivity of a *constitutional* holding of this Court, Congress has full authority to determine the retroactivity of a *statutory* holding, as an incident of its Article I authority to define the scope of statutory rights. In *Beam*, the majority, in four separate opinions, rejected the doctrine of selective prospectivity for judicial decisions, ruling that, if an interpretation of federal law is applied to the parties in the case in which it is announced, that interpretation will be applied to pending and future cases

involving the same issue.[10] The Court adopted that rule in its opinion in *Harper* v. *Virginia Dep't of Taxation*, 113 S. Ct. 2510 (1993). The Court explained that the substantive law does not "shift and spring" based on the equities of particular litigants and that its holding "heeds the admonition" that the Court lacks "constitutional authority * * * to disregard current law or to treat similarly situated litigants differently." *Harper*, 113 S. Ct. at 2517-2518 (internal quotation marks omitted).

The considerations that prompted the Court to reject selective prospectivity in *Beam* and *Harper* reflect limitations on the judicial function—not the legislative function.[11] As one Justice noted in *Beam*, selective prospectivity is contrary to "the integrity of judicial review, which does not justify applying principles determined to be wrong to litigants who are in or may still come to court." 111 S. Ct. at 2450

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[10] *Beam*, 111 S. Ct. at 2441-2448 (Souter, J., joined by Stevens, J.); *id.* at 2448 (White, J., concurring in the judgment); *id.* at 2449-2450 (Blackmun, J., joined by Marshall and Scalia, JJ., concurring in the judgment); *id.* at 2450 (Scalia, J., joined by Marshall and Blackmun, JJ., concurring in the judgment).

[11] In *Beam*, only three Justices expressed the view that the rule against selective prospectivity is constitutionally based. 111 S. Ct. at 2449-2450 (Blackmun, J., joined by Marshall and Scalia, JJ., concurring in the judgment); *id.* at 2450 (Scalia, J., joined by Marshall and Blackmun, JJ., concurring in the judgment). In *Harper*, the Court suggested that the rule has constitutional overtones, but did not explicitly rest its decision on constitutional grounds. Even assuming that *Harper* is constitutionally grounded, however, the grounds for that decision rest on Article III and the constitutional authority of the courts, 113 S. Ct. at 2517-2518, not constitutional limits on Congress.

(Blackmun, J., concurring in the judgment). Yet, courts do not offend that principle by giving effect to *legislation* that has the effect of limiting the retroactive impact of a statutory holding. It is integral to the judicial function to give effect to changes in the law that affect pending cases. *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801); *Bradley* v. *School Bd.*, 416 U.S. 696, 711 (1974). To do otherwise would require the courts to apply a rule of law that Congress has rejected, in defiance of Congress's power to establish the governing standards.

The point of *Beam* and *Harper* is that courts must apply the law as they find it evenhandedly to similarly situated litigants; nothing in those cases suggests that Congress lacks the power to change the law. While courts may not draw distinctions between parties that are not found in the applicable law itself, and therefore must observe "the principle that litigants in similar situations should be treated the same," *Beam*, 111 S. Ct. at 2444 (Souter, J.), Congress has the authority to draw rational distinctions among the persons who may be subject to the law and to make those distinctions binding in pending cases. And once Congress does so, *Beam* and *Harper* do not suggest that courts are constitutionally compelled to disregard those changes. As the Court noted in *Harper*, the judiciary lacks constitutional authority "to disregard *current* law." 113 S. Ct. at 2517 (emphasis added).

Nor is any question raised in this case regarding the constitutionality of Section 27A(a) because it requires courts to employ the "principles of retroactivity" found in the jurisdiction's laws as of June 19, 1991, 15 U.S.C. 78aa-1(a) (Supp. III 1991), and because

some courts have implemented that provision by applying the retroactivity test of *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971). See Pet. 12. The "principles of retroactivity" clause was not applied in this case. That clause applies in those circuits that had adopted a federal limitations rule before *Lampf*. See *Lampf*, 111 S. Ct. at 2781 (noting that the Second, Third, and Seventh Circuits had previously adopted a federal rule). In those circuits, Section 27A(a) requires the courts to determine whether the federal limitations rule adopted in that circuit should be applied retroactively. See 137 Cong. Rec. S18,624 (daily ed. Nov. 27, 1991) (Sen. Bryan). Because the Eleventh Circuit had not adopted a new federal limitations rule as of June 19, 1991, Section 27A(a) does not call into play "principles of retroactivity" in that circuit. In any event, this Court rejected *Chevron Oil* as a *judicially fashioned* means of determining the retroactive effect of its decisions. *Harper*, 113 S. Ct. at 2516, n.9. That holding does not preclude Congress from directing courts to draw on their previously established rules of retroactivity, based on *Chevron Oil* or some other standard, in identifying the litigants whose reasonable expectations under prior law will be protected. Cf. *Heckler* v. *Mathews*, 465 U.S. 728 (1984). Congress's power to determine which litigants will be governed by a particular limitations period for a statutory cause of action embraces the power to determine whether and how new interpretations of those limitations periods should be applied retroactively. Because *Beam* and *Harper* do not limit the power of Congress to prescribe the retroactive operation of statutes, those cases do not affect Section 27A(a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 92-2061

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

SCIENTIFIC-ATLANTA, INC.,

Petitioner,

v.

RUSSELL HENDERSON, *et al.*,
Individually and as Class Representatives,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This is a private Section 10(b) federal securities fraud/pendent state fraud national class action against the petitioner, a publicly traded stock company. Based on the statute of limitations established by this Court in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,* 501 U.S. ___ , 111 S.Ct. 2773 (1991), the District Court for the Northern District of Georgia granted petitioner's motion for a judgment on the pleadings and dismissed with prejudice respondents' federal securities fraud class action certified under Fed.R.Civ.P. 23(b)(3), and dismissed without prejudice respondents' pendent state fraud class action. Respondents appealed the decision to the Eleventh Circuit Court of Appeals. While the case was pending on appeal, Section 27A of the Securities Exchange Act of 1934 was enacted, relied upon by respondents, and briefed and argued by all parties, including the United States, as intervenor, and the Securities and Exchange Commission as *amicus curiae,* all of whom supported the constitutionality of Section 27A. The Eleventh Circuit held Section 27A constitutional against the challenges made by petitioner, applied it to this pending case on appeal, and reversed the district court judgment. The question presented to this Court is:

> Does application of Section 27A of the Securities Exchange Act of 1934 to this timely appealed, pending case, violate the doctrine of separation of powers?

Page

TABLE OF CONTENTS

QUESTION PRESENTED. i
TABLE OF AUTHORITIES ii
STATEMENT OF THE CASE 1
REASONS FOR REFUSING THE PETITION 5
CONCLUSION 27

TABLE OF AUTHORITIES

Cases:

Anixter v. Home-Stake Production Co., 977 F.2d 1533 (10th Cir.), *cert. denied, sub nom., Cross v. Thorner*, ___ U.S. ___, 113 S.Ct. 1842 (1993). 5, 7, 12

Berning v. A.G. Edwards & Sons, 990 F.2d 272 (7th Cir. 1993) . . . . . *passim*

Bradley v. Richmond School Board, 416 U.S. 696 (1974). 4

Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798) 21, 22, 23

Campbell v. Holt, 115 U.S. 620 (1885) 10, 20

Ceres Partners v. GEL Associates, 918 F.2d 349 (2d Cir. 1990) 19

Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945), *rehearing denied*, 325 U.S. 896 (1945) . . . 10, 11, 20

Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) 19

Cooke v. Manufactured Homes, Inc., ___ F.2d ___, No. 93-1005, 1993 WL 248257 (4th Cir. July 9, 1993) 5, 14

Cooperativa De Ahorro y. Credito Aguada v. Kidder, Peabody & Co., 993 F.2d 269 (1st Cir. 1993). 6

Eikenberry v. Callahan, 653 F.2d 632 (D.C. Cir. 1981). 4

Electrical Workers v. Robins & Myers, Inc., 429 U.S. 229 (1976). 11

G & C Merriam Co. v. Saalfield, 241 U.S. 22 (1916). 22

Cases, continued: Page

General Motors Corp. v. Romein, ___ U.S. ___, 112 S.Ct. 1105 (1992) 23

Gilbertson v. Leasing Consultants Associates, Civ. Act. No. 86-1369-RE (D. Or., Feb. 16, 1992) 19

Gordon v. United States, 117 U.S. 697 (Appendix 1885) . . . 20

Gray v. First Winthrop Corp., 989 F.2d 1564 (9th Cir. 1993) 5, 13, 20, 24

Griffith v. Kentucky, 479 U.S. 314 (1987). 4

Harper v. Virginia Dept. of Taxation, ___ U.S. ___, 113 S.Ct. 2510 (1993), 1993 WL 209718 . . . . . 8, 15, 20

Hayburn's Case, 2 U.S. (2 Dall.) 408 (1792). 20

Henderson v. Scientific-Atlanta, Inc., 971 F.2d 1567 (11th Cir. 1992) . . . . . *passim*

Hurtado v. California, 110 U.S. 516 (1884) 20

In re Data Access System Securities Litigation, 843 F.2d 1537 (3rd Cir.) (*en banc*), *cert. denied*, 488 U.S. 849 (1988). 19

James B. Beam Distilling Co. v. Georgia, 501 U.S. ___, 111 S.Ct. 2439 (1991) 2, 15, 20

Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. ___, 111 S.Ct. 2773 (1991). . . . . *passim*

Litton Industries, Inc. v. Lehman Brothers Kuhn Loeb, Inc., 967 F.2d 742 (2d Cir. 1992). 6

Musick, Peeler & Garrett v. Employers Insurance of Wausau, ___ U.S. ___, 113 S.Ct. 2085 (1993). 8, 12, 15

Pacific Mut. Life Ins. Co. v. First Republic Bank Corp., ___ F.2d ___, No. 92-1662, 1993 WL 268650 (5th Cir. July 20, 1993) 6, 22

Pension Benefit Guaranty Corp. v. R. A. Gray & Co., 476 U.S. 717 (1984) 10, 14, 23

Plaut v. Spendthrift Farm, Inc., ___ F.2d ___, 1993 WL 290399 (6th Cir. Aug. 3, 1993) 6

Cases, continued: Page

Robertson v. Seattle Audubon Society, ___ U.S. ___, 112 S.Ct. 1407 (1992) 15, 16, 17, 18

Rosenthal v. Dean Witter Reynolds, Inc., 982 F.2d 529 (10th Cir.) *per curiam, cert. denied*, 113 U.S. 2339 (1993) 5, 7

Short v. Belleville Shoe Mfg Co., 908 F.2d 1385 (7th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2887 (1991) 19

Smith v. Duff & Phelps, Inc., 891 F.2d 1567 (11th Cir. 1990), petition for rehearing *en banc denied*, 904 F.2d 712 (11th Cir. 1990) 18

TGX Corp. v. Simmons, ___ F.2d ___, No. 92-3375, 1993 WL 268650 (5th Cir. July 20, 1993) 6, 22

United States v. Klein, 80 U.S. (13 Wall.) 128 (1871) 11, 16, 17

United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801) 21, 22

United States v. Sioux Nation of Indians, 448 U.S. 371 (1980) 17, 21, 22

United States v. Sperry Corp., 493 U.S. 52 (1989) 14

Constitution and Statutes:

U.S. Constitution:

Article I 5, 7, 15, 24

Article III 3, 5, 7, 15

Amendment V (Due Process Clause) 3

Federal Deposit Insurance Corporation Improvement Act of 1991, Pub.L.No. 102-242, §476, 105 Stat. 2236, 2387 (1991) (codified at 15 U.S.C. §78aa-1) 3

Securities Exchange Act of 1934, 15 U.S.C. §78 *et seq.*:

Section 9(e), 15 U.S.C. §78i(e) 5

Section 10(b), 15 U.S.C. §78j(b) 1, 4, 5, 8, 25

Constitution and Statutes, continued: Page

Section 27A, 15 U.S.C. § 78aa-1 (Supp. III 1991) . . . . *passim*

Federal Rules of Civil Procedure:
Rule 23(b)(3) 2

No. 92-2061

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

SCIENTIFIC-ATLANTA, INC.,

Petitioner,

v.

RUSSELL HENDERSON, *et al.*,
Individually and as Class Representatives,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

In September, 1988, respondents' private Section 10(b)[1] federal securities fraud/pendent state fraud class action was filed against petitioner Scientific-Atlanta, Inc. (Scientific-Atlanta) in the Northern District of Georgia. The action involved acts of fraud and misrepresentation

[1] Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b).

by petitioner in the marketing of its publicly traded stock, and sought recovery on behalf of purchasers of its common stock during the class period of January 1, 1981, through August 31, 1983.[2] The district court certified the class action under Fed.R.Civ.P. 23(b)(3) on August 21, 1989, and appropriate written class action notices were given to the 40,000 member class, with opt-out rights expiring on June 18, 1990.

After lengthy discovery, motions (over forty), hearings, orders (approximately thirty, including orders overruling petitioner's three motions for summary judgment), and proceedings, a pretrial order of almost six hundred pages was entered, and the trial of this national class action was set for December, 1990. The district court then postponed the trial, first specially setting it to begin February 4, 1991, and later to begin June 3, 1991. Trial was again postponed *sua sponte*, and, by Order entered May 30, 1991, the parties were directed to stand ready for trial thereafter on one week's notice. By that time, the plaintiffs estimated "that they had invested more than $2 million and 10,000 hours of attorney time in this class action." *Henderson v. Scientific-Atlanta, Inc.*, 971 F.2d 1567, 1574, n.6 (11th Cir. 1992), reprinted in the Appendix to the Petition for Certiorari (hereinafter "App.") at 14a, n.6.

Based on *Lampf*[3] and *Beam*[4] decided by this Court on June 20, 1991, the district court on September 30, 1991,

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[2] Petitioner's List of Parties incorrectly states the class period as ending August 20, 1983.

[3] *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. ___, 111 S.Ct. 2773 (1991).

[4] *James B. Beam Distilling Co. v. Georgia*, 501 U.S. ___, 111 S.Ct. 2439 (1991).

entered a judgment on the pleadings, based on the new *Lampf* statute of limitations, in favor of petitioner on respondents' federal securities fraud claims, and dismissed without prejudice respondents' pendent state fraud claims. Respondents appealed to the Eleventh Circuit Court of Appeals. While the appeal was pending and during briefing, Congress enacted Section 476 of the Federal Deposit Insurance Corporation Improvement Act of 1991, amending the Securities Exchange Act of 1934 by adding as Section 27A a "Special Provision Relating to Statutes of Limitation in Private Causes of Action," codified as 15 U.S.C. §78aa-1 (Section 27A). Petitioner and respondents had opportunity to, and did in their briefs and at oral argument before the Eleventh Circuit, discuss the effect of Section 27A on the applicable statute of limitations in this case, and did address all claims of petitioner that Section 27A was unconstitutional in violation both of the doctrine of separation of powers embodied in Article III of the Constitution and the Due Process Clause of the Fifth Amendment. The United States intervened as a matter of right, and with the Securities and Exchange Commission as *amicus curiae,* filed a brief and orally argued, as did respondents, that Section 27A was constitutional and did not violate the doctrine of separation of powers, nor did it deny Scientific-Atlanta due process.

In reversing the district court judgment,[5] the Eleventh Circuit applied Section 27A, addressed all of petitioner's constitutional challenges, held that application of Section 27A did not violate petitioner's right to due process or

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[5]The Eleventh Circuit, in applying Section 27A, did not address any other of respondents' issues on appeal, none of which are now, or have in any manner ever been, waived or abandoned by respondents.

deny petitioner equal protection under the law (implicit in the Fifth Amendment's guarantee of due process), and held as to the specific question here presented:

> Like the Compromise at issue in *Audubon*, section 27A does implement a change in the law; it amends the Securities Exchange Act to provide the statute of limitations for private causes of action under section 10(b) that were filed by June 19, 1991. But Congress has not interfered with the judicial process. The Act does not require courts to make any particular findings of fact or applications of law to fact. Any effect on pending cases is solely a result of a change in the underlying law. We therefore hold that section 27A does not violate the doctrine of separation of powers.

Henderson, App. at p. 11a.

Not all of the provisions of Section 27A are at issue in the present petition. Section 27A(b), addressing reinstatement of dismissed actions, is inapplicable, as the present case was pending on appeal when Section 27A was signed into law on December 19, 1991. This Court has held that a judgment is not final until the time for filing a petition for certiorari has expired or such petition has been denied. *Griffith v. Kentucky*, 479 U.S. 314 (1987) and *Bradley v. Richmond School Board*, 416 U.S. 696 (1974). *See also Eikenberry v. Callahan*, 653 F.2d 632 (D.C. Cir. 1981), and cases cited therein wherein the court stated: "The ordinary meaning of "pending" includes cases pending on appeal." *Id.* at 635. Petitioner does not assert otherwise. Similarly, as will be explained *infra*, the law in the Eleventh Circuit on June 19, 1991, clearly required application of the "state-borrowing doctrine" for the limitations period for Section 10(b) actions, and, therefore, the "principles of retroactivity" clause of Section 27A(a) is also not at issue.

Respondents also disagree with petitioner's inclusion of Article I, Section 1 of the United States Constitution and Section 9(e) of the 1934 Act, 15 U.S.C. §78i(e) (1988), in the App. at pp. 37a-38a. First, petitioner's brief to the Eleventh Circuit stated, in its summary of the argument, that "Congress has violated the separation of powers required by Article III of the Constitution." Petitioner presents new arguments to this Court, predicated upon Article I, which were not presented to the Court of Appeals. Second, as Congress has directly spoken to the issue of the appropriate limitations period for this, and other, Section 10(b) securities fraud actions, 15 U.S.C. §78i(e) is also not at issue.

REASONS FOR REFUSING THE PETITION

There is no need for this Court to intervene. There is no conflict at all among the courts of appeal as to the application of Section 27A to pending cases such as the case at bar. There is no reason to believe that other courts of appeal will not follow the decision here involved of the Eleventh Circuit, or the decisions of the First, Fourth, Seventh, Ninth and Tenth Circuits, all holding that Section 27A is constitutional and does not violate the Doctrine of Separation of Powers when applied to pending cases. *See Anixter v. Home-Stake Production Co.*, 977 F.2d 1533 (10th Cir.), *cert. denied, sub nom., Cross v. Thorner*, ___ U.S. ___ , 113 S.Ct. 1842 (1993); *Rosenthal v. Dean Witter Reynolds, Inc.*, 982 F.2d 529 (10th Cir.) *per curiam, cert. denied*, 113 U.S. 2339 (1993); *Berning v. A.G. Edwards & Sons*, 990 F.2d 272 (7th Cir. 1993); *Gray v. First Winthrop Corp.*, 989 F.2d 1564 (9th Cir. 1993); *Cooke v. Manufactured Homes, Inc.*, ___ F.2d ___ , No. 93-1005, 1993

WL 248257 (4th Cir. July 9, 1993); and *Cooperative De Ahorro y. Credito Aguada v. Kidder, Peabody & Co.*, 993 F.2d 269 (1st Cir. 1993).[6]

Pacific Mutual Life Ins. Co. v. First Republic Bank Corp., ___ F.2d ___ , No. 92-1662 and *TGX Corp. v. Simmons*, ___ F.2d ___ , No. 92-3375, 1993 WL 268650 (5th Cir. July 20, 1993), were cases wherein Section 27A(b) was applied, not to pending cases, but to cases dismissed under *Lampf* from which no appeal had been taken. The Fifth Circuit upheld the constitutionality of Section 27A(b) in that context, holding that the section did not violate the doctrine of separation of powers, nor unconstitutionally usurp judicial authority by upsetting final judgments, nor deny due process and equal protection of the law.

Plaut v. Spendthrift Farm, Inc., ___ F.2d ___ , No. 92-5591, 1993 WL 290399 (6th Cir. Aug. 3, 1993), decided by a panel of the Court of Appeals for the Sixth Circuit on August 3, 1993, with one judge concurring in part and dissenting in part, held that Section 27A(b) requires courts to nullify or vacate their properly rendered final judgments, and that, under the circumstances there presented, said subsection was an unconstitutional usurpation of the judiciary power. In that case the plaintiffs did not appeal the district court's dismissal of their claim with prejudice. It was only after the enactment of Section 27A that those plaintiffs filed a motion on Feb-

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[6] *See also Litton Industries, Inc. v. Lehman Brothers Kuhn Loeb, Inc.*, 967 F.2d 742, 751, n.6 (2d Cir. 1992), where the Court stated "... we are unimpressed by the cogency of their analysis ..." in reference to district courts outside the Second Circuit finding Section 27A unconstitutional. All Second Circuit district courts have ruled 27A constitutional. *See* App. 40a-41a.

ruary 11, 1992, to have their finally dismissed claims reinstated. The district court denied the motion, and held the statute unconstitutional as applied to such a final judgment. That action was upheld on appeal by the Sixth Circuit, holding that that portion of the 1991 Act which commanded the district court to reinstate the dismissed cause of action violated the doctrine of separation of powers and deprived the defendants of their vested rights in the court's final judgment.

In *Anixter, supra,* and *Rosenthal, supra,* both involving pending cases, as does this present case, this Court has already refused the petitions for certiorari. The continuing, consistent and unanimous rejection of constitutional challenges, including the instant challenge, to the application of Section 27A to *pending* cases, by the federal appellate courts throughout the United States, only further supports refusing the present petition.

Relevant support from this Court of Section 27A and Congress' Article I power also appears in recent Court pronouncements, with no separation of powers overtones or indication of Article III conflict. This Court has already recognized the validity and effect of Section 27A:

> The second statute is the recent congressional enactment respecting limitations periods for 10b-5 actions. Following our resolution two Terms ago of a difficult statute of limitations issue for 10b-5 suits, *see Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,* 501 U.S. ___ , 111 S.Ct. 2773, 115 L.Ed.2d 321 (1991), Congress intervened by limiting the retroactive effect of our decision, and the caution in its intervention is instructive. In an approach parallel to the one it adopted for the insider trading statute, Congress did no more than

> direct the applicable "limitation period for any private civil action implied under section 78j(b) of this title [§10(b) of the 1934 Act] that was commenced on or before June 19, 1991 [the day prior to issuance of *Lampf, Pleva*]." 15 U.S.C. §78aa-1 (Supp. III).
>
> We infer from these references an acknowledgement of the 10b-5 action without any further expression of legislative intent to define it. *See Herman & MacLean v. Huddleston,* 459 U.S. 375, 384-386, 103 S.Ct. 683, 688-689, 74 L.Ed.2d 548 (1983); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran,* 456 U.S. 353, 378-382, 102 S.Ct. 1825, 1839-1841, 72 L.Ed.2d 182 (1982). Indeed, the latter statute, §78aa-1, not only treats the 10b-5 action as an accepted feature of our securities laws, but avoids entangling Congress in its formulation. That task, it would appear, Congress has left to us.

Musick, Peeler & Garrett v. Employers Insurance of Wausau, ___ U.S. ___, 113 S.Ct. 2085, 2089 (1993).

Congress was exercising "the quintessentially 'legislat[ive]' prerogative to make rules of law retroactive or prospective . . ." *Harper v. Virginia Dept. of Taxation,* ___ U.S. ___, 113 S.Ct. 2510 (1993), 1993 WL 209718 at *5. *Harper* noted that " 'the nature of judicial review' strips" this Court of such prerogative, *id.*, whereas such prerogative clearly lies within legislative power.

Section 27A also constitutes Congress' first legislative enactment recognizing, approving and codifying a federal private cause of action under Section 10(b). Section 27A "treats the 10b-5 action as an accepted feature of our securities laws . . . ." *Musick,* 113 S.Ct. at 2089. Congress has clearly amended the federal securities laws, has undertaken a plainly legislative matter (a private cause of

action and statutes of limitation), and has exercised the quintessential legislative prerogative, to wit, the retroactive and prospective applicability of a rule of law.

As we initially noted:

> "It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one of complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." [*Quoting from Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) at 15, citations omitted].

We further explained that the strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively. Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches:

> . . . "But our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations [citations omitted]. This is true even though the effect of the legislation is to impose a new duty or liability based on past acts [citations omitted]." [*Quoting from Usery*, 428 U.S. at 15-16, citations omitted].

To be sure, we went on to recognize that retroactive legislation does have to meet a burden not faced by legislation that has only future effects. "It does not follow . . . that what Congress can legislate pros-

> pectively it can legislate retrospectively. The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." [*Usery*, 428 U.S. 1] at 16-17. *But that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose* . . . .
>
> We conclude that Congress' decision to apply the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act to employers withdrawing from pension plans during the five-month period preceding enactment of the Act is supported by a rational legislative purpose, and therefore withstands attack under the Due Process Clause of the Fifth Amendment . . . .

Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 729, 730, 733 (1984) (emphasis added).

For more than a century, this Court has consistently upheld legislative enactments affecting, or even completely eliminating, statute of limitation defenses. *See, e.g., Campbell v. Holt*, 115 U.S. 620 (1885), which held that a legislative repeal or extension of a statute of limitations, restoring a remedy to a plaintiff and divesting a defendant of a limitations defense, did not violate the Fourteenth Amendment, even after the action had been barred by the statute.

Following *Campbell*, this Court rendered its opinion in *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945), *rehearing denied*, 325 U.S. 896 (1945). *Chase* involved an action to recover the purchase price of securities sold in violation of the Minnesota Blue Sky Law. Reversing judgment for the plaintiff, the Minnesota Supreme Court held that the running of the statute of limita-

tions had not been tolled, based on a recent decision which adversely affected numerous pending cases. As Congress did in the present case, the legislature responded, enacting a new statute which provided that where the delivery of the securities had occurred more than five years prior to the Act's effective date, an action could be brought within one year. The United States Supreme Court rejected assertions of due process and equal protection violations, specifically recognizing that, despite the protection a specific limitations policy might offer while it exists, "[t]he history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control." *Chase Securities Corp.*, 325 U.S. at 314. As to the new legislative enactment, the Supreme Court also held that "[t]he effect of this was to abolish any defense that appellant might otherwise have had under the Minnesota statutes of limitation." *Id.* at 308. A legislative enactment having such an effect is a constitutional exercise of legislative authority. *See also Electrical Workers v. Robins & Myers, Inc.*, 429 U.S. 229, 244 (1976) (Congress constitutionally can provide for retroactive application of extended limitations period, even if it revives or restores a remedy lost due to the running of a statute of limitations.)

Petitioner argued below, as it does here, (Petition at pp. 8 & 14), that Congress, by enacting Section 27A, impermissibly directs the outcome of certain litigation and attempts to control the adjudicative process without making any change in the controlling provisions of existing law, thus purportedly running afoul of *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). However, as the Tenth Circuit held:

> This case is not *Klein*. Section 27A does not direct courts to make specific factual findings or mandate a result in a particular case. [citations omitted] It does not remove or alter the courts' constitutional adjudicatory function. Instead, in Section 27A, Congress prescribed a new statute of limitations for the judiciary to apply to all Section 10(b) litigation pending on June 19, 1991. [citations omitted] Surely, Congress has the power to change a rule of law and make that change applicable to pending cases. *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110, 2 L.Ed. 49 (1801).

Anixter v. Home-Stake Production Co., 977 F.2d at 1545. *In accord Henderson*, App. 11a. In following the Tenth Circuit, the Seventh also added that "[i]t is to be noted, in addition, that in *Klein* the Supreme Court wrote that Congress was free to change the law applicable to pending cases." *Berning*, 990 F.2d at 278, n.7, *citing Klein*, 80 U.S. at 146-47.

As held by all courts of appeal considering the issue, and as observed by this Court in *Musick, supra*, Congress changed the law with Section 27A. Congress did not "revise a judgment of this Court" as contended by petitioner. Petition p. 13. After recognizing the congressional change of law effectuated by Section 27A, the Ninth Circuit held:

> It is not seriously argued that Congress may not override a judicial interpretation of a statute. Common examples of this practice include the Civil Rights Act of 1991, 105 Stat. 1071 (1991), and the Civil Rights Restoration Act of 1987, 102 Stat. 28 (1988). *See also* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L.J. 331 (1991) (discussing over one hundred examples in the past twenty

> years of Congress' overriding Supreme Court interpretations of statutes); Abner J. Mikva and Jeff Bleich, *When Congress Overrules the Court,* 79 Cal.L.Rev. 729, 730-31 (1991) ('Congressional overruling of a Supreme Court decision is not a particularly exceptional event.'). Moreover, it is of no constitutional consequence that section 27A affects, or is even directed at, a specific judicial ruling so long as that legislation modifies the law. *See Pennsylvania v. Wheeling and Belmont Bridge Co.,* 59 U.S. (18 How.) 421, 15 L.Ed. 435 (1856); *see also Robertson,* ___ U.S. at ___ , 112 S.Ct. at 1414 (specific reference to two pending cases in legislation itself not constitutionally fatal); *Seattle Audubon Soc'y,* 914 F.2d at 1315 ('Congress can *amend or repeal* any law, even for the purpose of ending pending litigation.') (emphasis in original).

Gray v. First Winthrop Corp., supra, at 1569. *See also, Henderson,* App. 10a-11a, and *Berning, supra,* at 277 ("Congress is free to change the law applicable to pending cases. . . .").

The Eleventh Circuit's opinion, as well as the opinions of the other circuits rejecting separation of powers challenges to 27A, are well grounded and in keeping with the numerous decisions of this Court absolutely permitting purely retroactive application of a legislative enactment. For example, the Fourth Circuit held:

> The circuits that have addressed the constitutionality of §27A squarely have held that it passes constitutional muster. *See Cooperativa de Ahorro Y Credito Aguada v. Kidder, Peabody & Co.,* No. 92-2148, 1993 WL 156464, at [FN*] 3 & n.11 (1st Cir. May 19, 1993) (adopting reasoning of various circuits in holding that §27A is constitutionally firm); *Gray v. First Winthrop Corp.,* 989 F.2d 1564,

> 1568-69 (9th Cir. 1993) (holding that §27A does not violate the separation of powers doctrine); *Berning v. A.G. Edwards & Sons, Inc.*, 990 F.2d 272, 277-79 (7th Cir. 1993) (holding that §27A does not violate the rule against selective prospectivity of judicial decisions articulated in *Beam* and therefore does not violate the separation of powers doctrine); *Anixter v. Home-Stake Prod. Co.*, 977 F.2d 1533, 1543-47 (10th Cir. 1992) (holding that §27A does not violate separation of powers doctrine by prescribing a rule of decision in a particular case), *cert. denied*, 113 S.Ct. 1841 (1993); *Henderson*, 971 F.2d at 1571-73 (holding that §27A does not violate the separation of powers doctrine); *see also Litton Indus. v. Lehman Bros. Kuhn Loeb, Inc.*, 967 F.2d 742, 751 n.6 (2d Cir. 1992) (noting in dicta that it was "unimpressed" by the decisions that hold §27A unconstitutional). We find persuasive the reasoning of the courts of appeals holding that §27A does not violate the constitution. Therefore, we join these circuits in holding that §27A does not violate the separation of powers doctrine.

Cooke v. Manufactured Homes, Inc., ___ F.2d ___, (4th Cir., July 9, 1993) 1993 WL 248257 at *8 (footnotes omitted).

This Court held in *United States v. Sperry Corp.*, 493 U.S. 52 (1989), that the burden for justifying retroactive legislation "is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." *Id.* at 64. *In accord, Pension Benefit Guar. Corp. v. R.A. Gray & Co., supra.*

> The purpose of Section 27A is clear. Congress sought to reinstate those causes of action that were timely when filed, but which were subsequently rendered untimely by the Supreme Court's decision

> in *Lampf*. *See* Pub.L. No. 102-242, §476, 105 Stat. 2236, 2387 (1991). *See also* 137 Cong. Rec. S18, 624 (daily ed. Nov. 27, 1991) (statement of Sen. Bryan) (noting that "*Lampf* changed the rules in the middle of the game for thousands of fraud victims who already had suits pending"); 137 Cong. Rec. S17,315 (daily ed. Nov. 21, 1991) (statement of Sen. Riegle) (stating that Congress "must take steps to protect those investors who had cases pending prior to [*Lampf*]"). Protecting these litigants from an unexpected change in the law is a legitimate governmental interest, and section 27A is rationally related to that end.

Henderson, App. 12a.

Petitioner also predicates its claim of an alleged misconstruction of *Robertson v. Seattle Audubon Society*, ___ U.S. ___ , 112 S.Ct. 1407 (1992), by the circuit courts upon the contention that *Beam* not only applies to Congressional enactments, but that, in *Beam* this Court, *sub silento*, overruled its entire jurisprudence regarding the propriety of retroactive legislation, and somehow held that retroactivity is now a matter "within the exclusive purview of the judiciary." Petition, p. 19. Obviously, this Court did not so rule. *Beam* was, at most, addressing Article III limitations on judicial power, not Article I legislative powers. *Berning v. A.G. Edwards & Sons*, *supra*, at 277-78. On the issue of retroactivity, Congress did nothing more than limit the retroactive effect of *Lampf* with the enactment of Section 27A. *Musick*, *supra*, 113 S.Ct. at 2089. In so doing, Congress was exercising a "quintessentially 'legislat[ive]' 'prerogative." *Harper*, *supra*, 113 S.Ct. at ___ , 1993 WL 209718 at *5.

Petitioner contends that the construction of *Seattle Audubon* by the courts of appeals results in tacit overruling of all of this Court's separation of powers decisions "and has rendered *United States v. Klein* a dead letter." Petition p. 18. Petitioner then goes so far as so assert that without clarification by this Court, "the separation of powers doctrine as enunciated by the Court throughout its history will cease to exist." Petition p. 20. This hyperbole is not supported by any courts of appeals' analysis of *Seattle Audubon*, nor by any examination of this Court's separation of powers jurisprudence. For example, in *United States v. Klein, supra*, Congress sought to reverse the effect of a presidential pardon which was expressly intended to restore property to members of the Confederacy who took a loyalty oath. Congress did not amend any existing Act. Rather, Congress endeavored to divest the Supreme Court of jurisdiction to enter any order *except* one that would deny the claimant the benefits which were expressly promised by the Executive Branch through the pardon power. The Court held that the Constitution prohibited Congressional direction that the Court could only decide the *merits* of the claim in favor of the government. The Court recognized that Congress *may* however, act so as to affect pending cases:

> [W]e do not at all question what was decided in the case of *Pennsylvania v. Wheeling Bridge Co.*, [18 Howard, 429]. In that case, after a decree in this Court that a bridge, in the then state of the law, was a nuisance and must be abated as such, Congress passed an act legislating the structure and making it a post road; and the court held that the bridge had ceased to be a nuisance by the exercise of the constitutional powers of Congress and denied the motion. *No arbitrary rule of decision was pre-*

> *scribed in that case, the court was left to apply its ordinary rules to the new circumstances created by the Act.*

Klein, 80 U.S. at 146-147 (emphasis added). As also noted in *Berning, supra,* this Court wrote in *Klein* "that Congress was free to change the law applicable to pending cases." 990 F.2d at 278, n.7, citing 80 U.S. 146-47.

Similarly, in *United States v. Sioux Nation of Indians,* 448 U.S. 371 (1980), the Court of Claims had determined that the Indians' claims arising from the government's taking of the Black Hills were barred by *res judicata.* Congress intervened, directing review of the merits of the claims without regard to the defenses of *res judicata* and collateral estoppel. Finding no violation of separation of powers, the Court stated that legislative elimination of a technical legal defense does not improperly direct the outcome of the litigation, as "Congress left no doubt that the Court of Claims was free to decide the merits of the takings claim in accordance with the evidence it found and applicable rules of law." *Id.* at 392. The Court distinguished *Klein, supra,* by observing that Congress did *not* prescribe a rule of decision; it only eliminated a technical defense "so that a legal claim could be resolved on the merits." *Sioux Nation,* 448 U.S. at 404. Based on *Sioux Nation,* Congress can constitutionally do that which it did in enacting section 27A – eliminate a newly announced limitations defense to allow pending cases to be decided on the merits. Such action does not direct the outcome of the pending case on its merits.

The courts of appeals' analyses and applications of *Seattle Audubon, supra,* regarding the constitutionality of applying Section 27A to pending cases, have been, and

remain correct. In *Seattle Audubon, supra,* Congress passed the "Northwest Timber Compromise" which not only provided timber management plans regarding issues in pending lawsuits, but directed that the Act's terms mandated a particular judgment in the pending case and further provided that: "[t]he guidelines adopted by subsection (b)(3) and (b)(5) of this section *shall not be subject to judicial review by any court of the United States.*" 914 F.2d at 1313 (emphasis added). The Ninth Circuit had held the statute constituted a violation of separation of powers, and this Court unanimously reversed, finding that no separation of powers issue was even presented as Congress "did not order courts to make any particular findings of fact. Nor did it 'instruct the courts whether any particular timber sales would violate subsections (b)(3) and (b)(5).' *Id.*, ___ U.S. at ___ , 112 S.Ct. 1413." *Henderson,* App. 10a. Similarly, Section 27A directs no findings of fact and certainly does not instruct whether any particular conduct would constitute a violation of Section 10(b).

At the time this suit was filed in September, 1988, the Eleventh Circuit's clear law provided that the limitations period for private Section 10(b) actions would be borrowed from analogous state law. *See, e.g., Smith v. Duff & Phelps, Inc.*, 891 F.2d 1567, 1569-70 (11th Cir. 1990), *petition for rehearing en banc denied,* 904 F.2d 712 (11th Cir. 1990). The purpose of Section 27A was "to return plaintiffs and defendants to exactly the position that they had on June 19, 1991," by restoring pre-*Lampf* limitations periods for plaintiffs who filed suit before *Lampf* was decided. 137 Cong. Rec. S1738 (daily ed., Nov. 21, 1991) (Sen. Riegle). In jurisdictions that had borrowed state limitations periods prior to *Lampf,* "the borrowing approach would continue to apply" by virtue

of Section 27A. Id. at S18624 (daily ed., Nov. 27, 1991) (Sen. Bryan). In jurisdictions that already adopted a uniform federal limitations period before *Lampf*, but had declined to apply that period retroactively, "the courts would continue to be obliged to decline to apply the new rule." *Id.*

Since the Eleventh Circuit had clearly followed the borrowing doctrine prior to *Lampf*, and had not adopted a uniform federal limitations period, the present petition presents no case or controversy involving any purportedly improper applications of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). Therefore, petitioner's assertions regarding the need for certiorari based upon the "principles of retroactivity" clause of Section 27A and allegedly improper applications of *Chevron Oil* by other courts are wholly without merit. The "principles of retroactivity clause" does not apply to the present action or any other case arising in the Eleventh Circuit, and, therefore, no *Chevron Oil* analysis was, or would be, undertaken in this Circuit's application of Section 27A. The retroactivity clause is not directed at circuits like the Eleventh which had borrowed state limitations periods prior to *Lampf*, but rather at circuits that had anticipated *Lampf* by adopting a uniform federal limitations period.[7]

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[7] *See In re Data Access System Securities Litigation*, 843 F.2d 1537 (3d Cir.) (en banc), *cert. denied*, 488 U.S. 849 (1988); *Ceres Partners v. GEL Associates*, 918 F.2d 349 (2d Cir. 1990); *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385 (7th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2887 (1991). Similarly, petitioner's assertion that Section 27A has been held to eliminate the effect of the *Lampf* decision on parties in *Lampf* (Pet. at p. 12) is not before this Court. Moreover, petitioner cites to *Gilbertson v. Leasing Consultants Associates*, Civ. Act. No. 86-1369-RE (D.Or., Feb. 16, 1992) as support when the district court therein, based upon petitioner's own quotation, stated that it would con-

[footnote continued]

Petitioner seeks a writ exclusively upon the separation of powers doctrine, but notwithstanding, has made passing footnote reference to certain decisions from past centuries, and has asserted "due process of law" as a limitation on legislative power.[8] First, the much more recent decisions in *Campbell* and *Chase Security* dispose of any such claim. Second, the Eleventh Circuit also rejected such due process claims, *Henderson*, App. 11a-14a, as did the Ninth Circuit, *Gray*, 989 F.2d at 1572-1574. Third, petitioner has not sought certiorari on this issue.

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sider constitutional objections to reinstatement "at a later date." (Pet. at p. 12, n.16). Petitioner also neglects to note that while there was conflicting legislative history on the breadth of Section 27A with regard to the *Lampf* plaintiffs, *compare* 137 Cong. Reg. S17, 383 (daily ed., Nov. 21, 1991) (colloquy between Sen. Garn and Sen. Reigle), *with id.* at 11, 813 (daily ed., Nov. 26, 1991) (Rep. Markey), if Section 27A is construed to include the *Lampf* plaintiffs themselves, such holding would completely eliminate any selective prospectivity application and would therefore be appropriate under petitioner's own analysis of *Beam* and *Harper*.

[8]See, Petition, p. 8, n.9, citing *Gordon v. United States*, 117 U.S. 697 (Appendix 1885); *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792) and *Hurtado v. California*, 110 U.S. 516 (1884). These cases are inapplicable. *Gordon* involved a legislative mandate which required issuance of court opinions on compensation claims, but then deprived the courts of all powers to enforce it. The judgment would be disregarded *unless* the Secretary of Treasury 'approved' the award and *thereafter* Congress passed an appropriation to pay it. The Court noted that this was the "precise point" decided in *Hayburn's Case*, wherein Congress attempted to render certain judgments unenforceable unless Congress subsequently acted to approve the judgment. *Gordon* 117 U.S. 703. The dicta petitioner cites from *Hurtado* has neither citations in support nor analysis, and had nothing to do with the issue then before the Court; to wit, whether grand jury indictment was constitutionally mandated.

The provisions of Section 27A at issue in the petition do not even implicate final judgments. As recognized by the Seventh Circuit:

> [T]he stark fact is in the instant case there is no final judgment to be upset. At the time that section 27A was passed, this case was pending on appeal.... The principle that Congress may impose new legal rules applicable in pending cases was recognized by the Supreme Court almost two hundred years ago in *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110, 2 L.Ed. 49 (1801). Because Congress is free to make changes in the law applicable to pending civil cases, "[t]he legislature may change a statute of limitations at the last instant, extending or abrogating the remedy for an established wrong." *Tonya K. ex rel Diane K. v. Board of Education*, 847 F.2d 1243, 1247 (7th Cir. 1988).

Berning v. A.G. Edwards & Sons, Inc., 990 F.2d at 277.

Petitioner's contention that all federal courts have erroneously failed to apply *Lampf* to pending cases, notwithstanding Section 27A, is erroneous as a matter of law. "[I]f subsequent to the judgment and before the decisions of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied." *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801) at 110.

As already established, the decision in *Sioux Nation, supra*, supports respondents. Petitioner, however, relies upon the dissent therein of Justice Rehnquist, as well as dicta from the ancient dissent of Justice Iredell in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798). Petition, p. 13, n.19. Neither supports certiorari in the present case. In *Sioux Nation*, Justice Rehnquist was addressing the defense of *res judicata*. 448 U.S. at 426. An essential element of

that defense is the existence of a final judgment. *See, e.g., G & C Merriam Co. v. Saalfield*, 241 U.S. 22 (1916). The dissent made clear that it was addressing only final judgments.[9] There was no final judgment in the present case, and petitioner's arguments not only ignore *Schooner Peggy* and its progeny, but also seek their jettison from jurisprudence.

The state legislation at issue in *Calder v. Bull* was *not* "analogous to Section 27A" (Petition, p. 13, n.19) and did not even involve the constitutional doctrine upon which petitioner seeks certiorari. *Calder* involved an act of the Connecticut legislature which granted a new hearing in the probate court regarding a particular will, and the case came to the Supreme Court exclusively upon an *ex post facto* challenge. As noted by Justice Patterson in concurrence, the legislature of Connecticut "from the beginning, exercised the power to grant new trials." 3 U.S. (3 Dall.) at 395. As also much more recently noted by the Fifth Circuit, *Calder v. Bull* is an explicit refusal to recognize a civil *ex post facto* clause. *Pacific Mut. Life Ins. Co.*, ___ F.2d ___ , 1993 WL 268650 at *14, (also citing and quoting from *Galvan v. Press*, 347 U.S. 522, 531 (1954) and rejecting a retroactivity challenge to Section 27A).[10] Petitioner's similar retroactivity conten-

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[9] "This principle was again applied in *United States v. O'Grady*, 22 Wall 641, 647 (1875), where the Court refused to legitimize a congressional attempt to revise a final judgment rendered by the Court of Claims finding . . . 'it is equally certain that the judgments of the Court of Claims, *where no appeal is taken* to this court, are, under existing laws, *absolutely conclusive*. . . .' " *Sioux Nation*, 448 U.S. at 428 (Rehnquist, J. dissenting), (first emphasis added; second alteration in original).

[10] In *Calder*, Justice Iredell actually concurred in the result, only declining to adopt the reasoning. 3 U.S. (3 Dall.) at 398. Justice Iredell did not, as petitioner asserts, "implicitly suggest[]"

[footnote continued]

tions are likewise without merit. *See,* in addition to *Pension Benefit Guaranty Corp., supra, General Motors Corp. v. Romein,* ___ U.S. ___ , 112 S.Ct. 1105, (1992), holding that the retroactive effect of legislation passed specifically to correct the results of a state supreme court opinion was permissible and appropriate.

Six circuit courts of appeals (First, Fourth, Seventh, Ninth, Tenth and Eleventh) have unanimously reached the correct decision that Section 27A is constitutional as applied to pending cases. The Fifth Circuit has held it constitutional as applied to dismissed cases from which appeals were not taken. Another (the Second) has implicitly validated it, and all district courts in that circuit have held it constitutional. (App. 40a-41a) The district courts of the Third and District of Columbia Circuits have held Section 27A constitutional (App. 41a, 45a), and there has been no decision in the Eighth. (App. 43a) There is no conflict among the circuit courts of appeal as to the constitutionality of Section 27A with respect to pending cases.[11]

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that if the legislation at issue were federal, it would have exceeded federal legislative power. Petition, p. 13, n.19. Rather, Justice Iredell made clear his agreement that "[t]he policy, the reason and humanity, of the prohibition [against ex post facto law] *do not, I repeat, extend to civil cases . . . .*" 3 U.S. (3 Dall.) at 400 (emphasis added).

[11] Petitioner's contention that such non-existent "disarray" will continue to generate enormous litigation is also erroneous. In addition to the many reasons already noted resolving these issues, application of Section 27A requires parties either to have a pending Section 10(b) claim or, in the case of a finally dismissed claim, to move for reinstatement of the claim not later than sixty days after the enactment of that law on December 19, 1991. Moreover, considering district court opinions now reversed on appeal or predating circuit court decisions, the real tally of cases cited in petitioner's

[footnote continued]

> When Appellees' sophisticated constitutional arguments are dissected and properly analyzed under the frameworks of analysis that the Supreme Court has established, it becomes clear that they cannot undo what Congress has done. As Justice Blackmun stated in *Mistretta,* "we conclude, upon close inspection, that Petitioner's fears for the fundamental structural protections of the Constitution prove . . . 'more smoke than fire.' " 488 U.S. at 384, 109 S.Ct. at 661. Section 27A is a valid and lawful exercise of Congress' constitutional authority under Article I.

Gray v. First Winthrop Corp., supra, at 1574.

As nearly as possible, our three branches of government should function on a co-equal basis. The judicially created separation of powers doctrine is not contained in the written Constitution or Bill of Rights, and thus this Court should exercise judicial restraint in its application. Theoretically, the doctrine is as applicable to the judicial branch as it is to the legislative or executive branches of government. This Court exercised an essentially legislative function under Article I, when the Court "found" or created a *statute* of limitations and a *statute* of repose in *Lampf.* This Court selected a discrete section of the Securities Exchange Act of 1934 as a legislative genesis – one that had no tolling features and contained a statute

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Appendix, would be fifty-three upholding constitutionality and three to the contrary, all three predating the circuit court decisions and all within the Sixth Circuit, where under the circumstances of the cases considered, Section 27A(b) was declared unconstitutional by that circuit. However, a completely different constitutional question is presented by Section 27A(b) involving final judgments. While the Fifth and Sixth Circuits differ on that question, there is no conflict as to the non-final judgments in pending cases.

of repose – when there were other sections that did not have such draconian features. For this Court to reach a decision that Congress has no power to enact legislation which prospectively and retroactively recognizes a private right of action under Section 10b, and retroactively provides a window of relief in fairness to those who relied on the limitations existing in circuits prior to *Lampf*, would cause direct conflict between the co-equal branches of government.

The adoption of the Securities Exchange Act was a legislative function. This Court, in *Lampf*, admittedly was engaged in trying to discern what Congress intended as a statute of limitations, if Congress had enacted a private right of action for securities fraud in 1934, as that fraud was spelled out in Section 10(b) of the Securities Exchange Act of 1934. Section 27A was passed by Congress to make its intent legislatively explicit that there be a private right of action under Section 10(b), and that Congress intended that any Section 10(b) actions filed by June 19, 1991, be subject to statutes of limitations or of repose that then existed in those circuits where such suits had been filed. Congress also endorsed the statute of limitations and the statute of repose judicially created in *Lampf* to apply from June 20, 1991, forward in Section 10(b) actions. Now petitioner seeks to stand the separation of powers doctrine on its head by arguing that Congress cannot enact its own intent, but is barred by this Court's effort at divinement of that intent. This Court might as well decree that the Executive cannot grant clemency or pardon in cases of criminal conviction affirmed by this Court, as directing that Congress cannot legislatively change the law created by this Court's decisions. The only constant is the Constitution, and nowhere

within its framework is found a separation of powers doctrine as sought by this petitioner. Nor should there be. This Court has no constitutional authority, much less the time and political acumen, to "provide Congress with much needed guidance." (Petitioner's Brief p. 11). Nor should or can this Court "outline the borders of legitimate legislative action" (Petitioner's Brief p. 11).

The executive branch of our government, as represented by the Presidents who appointed this Court, and the legislative branch of our government, who advised the President and consented to such appointments, would be sorely pressed to explain to the citizenry of these United States that this Court has the judicial power to define, and render an advisory opinion as to, the functions of the executive and legislative branches of our government as requested by this petitioner. Fairness dictates that the wisdom of both this Court and Congress be recognized and respected. As to pending cases such as *Henderson,* there is no doubt that *Lampf* and Section 27A are compatible, and that Section 27A is constitutional.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 92-2061

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

SCIENTIFIC-ATLANTA, INC.,
Petitioner,
v.
RUSSELL HENDERSON, *et al.*
Individually and as Class Representatives,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
DISCUSSION OF NEW CIRCUIT CONFLICT	2
CONCLUSION	6
APPENDICES	
A. *Plaut v. Spendthrift Farm, Inc.*, No. 92-5591, 1993 WL 290399 (6th Cir. Aug. 3, 1993)	1a
B. Plaintiff's Protective Motion for Reinstatement and for Stay, *Henderson v. Scientific-Atlanta, Inc.*, Civil No. 1:88-CV-2208-RLV (N.D. Ga., filed Feb. 11, 1992)	28a
C. Appellants' Protective Motion for Reinstatement, *Henderson v. Scientific-Atlanta, Inc.*, No. 91-8938 (11th Cir., filed Jan. 24, 1992)	30a

TABLE OF AUTHORITIES

Cases — Page

Freeman v. Laventhol & Horwath, Civil No. 87-217 (E.D. Ky. Aug. 14, 1992), *oral argument pending*, No. 92-6193 (6th Cir.) 3

Hayburn's case, 2 U.S. (2 Dall.) 408 (1792) 3, 4

Henderson v. Scientific-Atlanta, Inc., 971 F.2d 1567 (11th Cir. 1992), *petition for cert. filed*, 62 U.S.L.W. 3002 (U.S. July 6, 1993) (No. 92-2061) 2, 3

James B. Beam Distilling Co. v. Georgia, —— U.S. ——, 111 S. Ct. 2439 (1991) 1, 4

Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, —— U.S. ——, 111 S. Ct. 2773 (1991) 1, 4

Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1855) 5

Plaut v. Spendthrift Farm, Inc., No. 92-5591, 1993 WL 290399 (6th Cir. Aug. 3, 1993) ..... *passim*

Robertson v. Seattle Audubon Society, —— U.S. ——, 112 S. Ct. 1407 (1992) 4

United States v. Sioux Nation of Indians, 448 U.S. 371 (1980) 4

United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801) 5

Statute

Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 476, 105 Stat. 2236, 2387 (1991) (codified at 15 U.S.C. § 78aa-1) ..... *passim*

Miscellaneous

T. Cooley, *Constitutional Limitations* (1868) 4

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION

INTRODUCTION

On August 3, 1993, a conflict in the circuits arose with respect to the sole separation of powers question presented by Scientific-Atlanta, Inc. ("Scientific-Atlanta") in its pending Petition for a Writ of Certiorari to the United States Court of Appeal for the Eleventh Circuit:

> Can Congress, consistent with the separation of powers doctrine, direct that the courts resolve certain pending or dismissed cases arising under the Securities Exchange Act by disregarding this Court's decisions in *Lampf, Pleva, Lipkind, Prupis & Pettigrow v. Gilbertson*, —— U.S. ——, 111 S. Ct. 2773 (1991), and *James B. Beam Distilling Co. v. Georgia*, —— U.S. ——, 111 S. Ct. 2439 (1991)?

The conflict was created by the United States Court of Appeals for the Sixth Circuit's opinion in *Plaut v. Spend-*

thrift Farm, Inc., No. 92-5591, 1993 WL 290399 (6th Cir. Aug. 3, 1993) (copy attached as Appendix A).

DISCUSSION OF NEW CIRCUIT CONFLICT

The Eleventh Circuit below, in a split decision, sustained the constitutionality of Section 476 of the FDIC Improvement Act of 1991, codified as Section 27A of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa-1 ("Section 27A"). *Henderson v. Scientific-Atlanta, Inc.*, 971 F.2d 1567 (11th Cir. 1992). Neither the Eleventh Circuit's decision nor Scientific-Atlanta's Certiorari Petition distinguishes between subsections (a) and (b) of Section 27A.[1] In *Plaut*, by contrast, the Sixth Circuit held that Section 27A "violates the doctrine of separation of powers and deprives the defendants of their vested rights in the court's final judgment." 1993 WL 290399 at *2; Appendix 4a, 5a ("§ 27A comes as a camel, one that has forcibly and quite unapologetically thrust its nose into the tent of the judicial branch").

The plaintiffs in *Plaut* did not have an appeal pending when Section 27A was enacted, and thus the Sixth Circuit decision concentrated on subsection (b) of Section 27A, which purports to allow reopening of otherwise final judgments. Nonetheless, although the Sixth Circuit does not address subsection (a) *per se*, 1993 WL 290339 at n.5; Appendix 5a ("The parties do not dispute this subsection; we therefore do not address it."), the Sixth Circuit made clear that it was not limiting its ruling to the facts of the case before it, but rather was considering the constitutionality

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[1] Uncertain whether their circumstances fell within subsection (a) or subsection (b), plaintiffs below filed two motions to reinstate pursuant to subsection (b), in the district court and circuit court below respectively, within 60 days of the enactment of Section 27A, "[i]n the event of the applicability of Section 27A(b)." Plaintiff's Protective Motion for Reinstatement and for Stay, *Henderson v. Scientific-Atlanta, Inc.*, No. 1:88-CV-2208-RLV (N.D. Ga., filed Feb. 11, 1992); Appellants' Protective Motion for Reinstatement, No. 91-8938 (11th Cir., filed Jan. 24, 1992) (copies of both motions attached as Appendix B and Appendix C respectively).

of Section 27A as a whole. *See, e.g.*, 1993 WL at 290399 at *5 n.11; Appendix 11a-12a (citing "the various [circuit] courts which have found § 27A constitutional [including *Henderson v. Scientific-Atlanta*]," and stating: "We strongly disagree with the rationale behind these decisions, but we will refrain from critiquing each of them point by point; we believe our reasoning speaks for itself").[2]

Indeed, the Sixth Circuit's reasoning in *Plaut* is fully consistent with the dissent's reasoning below and squarely supports the separation of powers reasoning in Scientific-Atlanta's Certiorari Petition. For instance, the Sixth Circuit relies heavily on the continued vitality of the rule in *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792):

> If the statute which gave rise to *Hayburn's Case* violated the Constitution, then § 27A(b) cannot stand, *a fortiori*. Reserving to Congress the power to "suspen[d]" and "revis[e]" decisions of the Supreme Court which had interpreted and applied valid Federal law would enable the Congress to sit as a "court of errors." In enacting § 27A, Congress has not simply reserved such power, as in *Hayburn's Case*, but actually exercised it.

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[2] Respondents and the United States may attempt to distinguish the reasoning in *Plaut* from the case below on the ground that the Sixth Circuit reasoning relied on "vested rights doctrine." This characterization is inapposite, because the Sixth Circuit itself emphasized that the "vested rights doctrine" was not decisional: "We do not base our decision primarily on this so-called 'vested rights doctrine,' despite its prominent separation of powers component, because the asserted ability of Congress to disturb rendered final judgments does not hinge on the nature of the judgment and its property value to the prevailing litigant, a central rationale of the vested rights doctrine." 1993 WL at 290399 at *5 n.12; Appendix 12a. The Sixth Circuit also is scheduled to hear oral arguments on September 20, 1993, in another appeal, this time involving Section 27A(a), in which the lower court declared Section 27A unconstitutional. *Freeman v. Laventhol & Horwath*, Civil No. 87-217 (E.D. Ky. Aug. 14, 1992), *oral argument pending*, No. 92-6193 (6th Cir.).

1993 WL 290339 at *5; Appendix 11a-12a; *see* Scientific-Atlanta Certiorari Petition at 8 ("The majority opinion below sustains congressional power to revise this Court's judgment in *Lampf,* and to suspend the judicial retroactivity principles announced in *Beam. Contra Hayburn's Case.*").

Likewise, the Sixth Circuit focuses on the judicial nature of Section 27A:

> Since we cannot say that the fundamental natures of the legislative and judicial powers have somehow changed since 1792, we cannot square § 27A(b) with *Hayburn's Case.* . . . Applying the general principles of existing law to specific circumstances, and enforcing the rights between parties created thereby constitute the essence of the judicial power.

1993 WL 290399 at *5, *8; Appendix 12a, 17a-18a; *see* Scientific-Atlanta Certiorari Petition at 13 n.19 ("Section 27A is manifestly 'judicial in its nature,' because the sole purpose and effect of the law is to 'set aside a decree of the court . . . and [to] grant[] a new hearing' for those plaintiffs whose causes of action were dismissed as a result of *Lampf* and *Beam.*" (citation omitted)).[3]

Finally, the Sixth Circuit's opinion distinguishes this Court's decisions in *Robertson v. Seattle Audubon Society,* —— U.S. ——, 112 S. Ct. 1407 (1992), *United States v. Sioux Nation of Indians,* 448 U.S. 371 (1980),

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[3] Rejecting the United States' argument that a judgment resting on a statute of limitation lacks the finality of a merits-based judgment, the Sixth Circuit said "we fail to identify a single case (besides the ones holding § 27A to be constitutional) which has held that the decision of a Federal court adjudging a claim to be time-barred is not a final judgment." 1993 WL 290399, at *8; Appendix 16a; *see* T. Cooley, *Constitutional Limitations* 369 (1868) ("He who has satisfied a demand cannot have it revived against him, and he who has become released from a demand by the operation of the statute of limitations is equally protected. In both cases the right is gone; and to restore it would be to create a new contract for the parties,—a thing quite beyond the power of legislation.").

Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1855), and *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), upon which the United States (as intervenor) and the various courts which have sustained Section 27A heavily rely:

> The Government completely mischaracterizes the cases it cites in support of its argument that "the Supreme Court has explicitly upheld a wide range of federal and state statutes that have divested litigants of final judgments." . . . Appellants here simply fail to draw a defensible constitutional parallel between judgments rendered in favor of the United States and judgments rendered in favor of private parties.

1993 WL 290399 at *6, *10; Appendix 13a, 21a; *see* Scientific-Atlanta Certiorari Petition at 16 ("Taken together, these misconstructions of recent Supreme Court rulings create a serious conflict with traditional separation of powers jurisprudence.").

CONCLUSION

The circuit conflict concerning the separation of powers question posed by this case compounds the already compelling reasons to issue a writ of certiorari.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

No. 92-5591

ED PLAUT; his wife, NANCY MCHARDY PLAUT; JOHN GRADY, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

SPENDTHRIFT FARM, INC.; BATEMAN EICHLER, HILL RICHARDS, INC.; FRANCIS M. WHEAT; GIBSON, DUNN & CRUTCHER; DELOITTE, HASKINS & SELLS; NORMAN D. OWENS; AMERICAN INTERNATIONAL BLOODSTOCK AGENCY, INC.,

Defendants-Appellees.

Argued March 1, 1993
Decided Aug. 3, 1993

J. Montjoy Trimble (argued & briefed), Trimble & Bowling, Lexington, KY, for plaintiffs-appellants.

Richard C. Ward, David C. Long, Barbara Edelman (briefed), Glenn C. Van Bever (argued), Wyatt, Tarrant & Combs, Lexington, KY, for Spendthrift Farm, Inc.

Guy R. Colson, Sr. Partner, Fowler, Measle & Bell, Elizabeth S. Feamster, Lexington, KY, James E. Burns, Jr., John Missing, Kevin P. Muck (briefed), Brobeck,

Phleger & Harrison, San Francisco, CA, for Bateman Eichler, Hill Richards Inc.

Robert M. Watt, III (briefed), J. David Smith, Jr., Stoll, Keenon & Park, Lexington, KY, William E. Johnson, Stoll, Keenon & Park, Frankfort, KY, for Francis M. Wheat and Gibson, Dunn & Crutcher.

L. Clifford Craig (argued & briefed), Taft, Stettinius & Hollister, Cincinnati, OH, Peter L. Ecabert, Deloitte, Haskins & Sells, New York City, Robert B. Craig (briefed), Taft, Stettinius & Hollister, Crestview Hills, KY, for Deloitte, Haskins & Sells.

Michael D. Meuser, Frank T. Becker, Harry B. Miller, Jr., Robert S. Miller (argued & briefed), Miller, Griffin & Marks, Lexington, KY, for Norman D. Owens and American Intern. Bloodstock Agency, Inc.

Scott R. McIntosh (briefed), U.S. Dept. of Justice, Appellate Div., Washington, DC, Barbara C. Biddle, U.S. Dept. of Justice, Appellate Staff, Civil Div., Mark B. Stern (argued), U.S. Dept. of Justice, Civil Div., Washington, DC, for amicus curiae U.S. and Securities and Exchange Com'n.

Kathryn Oberly (briefed), Washington, DC, for amicus curiae Arthur Andersen & Co., Ernst & Young, KPMG Peat Marwick and Price Waterhouse.

Before: KEITH and BATCHELDER, Circuit Judges; and CHURCHILL, Senior District Judge.*

ALICE M. BATCHELDER, Circuit Judge.

I.

Appellants, the plaintiffs before the District Court, representing a large number of sometime investors originally

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* The Honorable James P. Churchill, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

sued defendants on November 25, 1987, alleging violations of the securities laws, namely fraud and deceit in the sale of stock under Section 10(b) of the Securities Exchange Act of 1934 ("1934 Act")[1] and Securities and Exchange Commission Rule 10b-5.[2] Defendants owned "one of the Commonwealth's premier thoroughbred horse farms" (the District Court's characterization, to which we owe every deference) and issued stock in the enterprise in order to raise some thirty million dollars in cash; others of the named defendants were various legal and financial advisers to the venture. The appellants (or "shareholders") originally purchased their stock when defendants offered it for public sale in 1983.

For over three years, the pretrial litigation in the District Court proceeded apace. On June 20, 1991, however, the Supreme Court handed down Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S.Ct. 2773 (1991), which applied a uniform Federal time limit from another section of the 1934 Act to that action and all private § 10(b) actions. Lampf provided a three year period of repose, running from the date of a fraudulent securities contract of sale, or a one year limitation period, running from the date of discovery of the fraud.[3]

The District Court, applying Lampf retroactively on the authority of Beam Distilling Corp. v. Georgia, 111 S.Ct. 2439 (1991), which was announced the same day as Lampf, dismissed the shareholders' claims with prejudice on August 13, 1991. The shareholders did not file

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[1] 15 U.S.C. § 78j.

[2] 17 C.F.R. § 240.10b-5.

[3] Prior to Lampf, the Kentucky Blue Sky law provided a three year limitation period of this type of Federal securities action, running from the date of discovery. Ky.Rev.Stat.Ann. § 292.480. Two Circuits had already adopted the Federal one year/three year period adopted in Lampf; others had applied State limitations periods. See Lampf, 111 S.Ct. at 2777 n.1 (citing cases).

what they believed (correctly) would have been a meritless and indeed sanctionable appeal.

In November 1991, Congress passed the FDIC Improvement Act of 1991, ("1991 Act") which, on a plaintiff's motion made within sixty days of the effective date of the statute, December 19, 1991, required the District Courts to reinstate claims which had been dismissed as a result of the application of the Federal statute of limitations announced in Lampf. The shareholders filed such a motion on February 11, 1992. While finding that under the statute the shareholders were entitled to have their claims reinstated, the District Court held the statute unconstitutional as applied and denied the motion 789 F. Supp. 231. Since the portion of the 1991 Act which commands the District Court to reinstate the shareholders' dismissed cause of action violates the doctrine of separation of powers and deprives the defendants of their vested rights in the court's final judgment, we affirm.

II.

The disputed statutory provision of the 1991 Act provides: (b) Effect on dismissed causes of action. Any private civil action implied under section 78j(b) of this title that was commenced on or before June 19, 1991 (1) which was dismissed as time barred subsequent to June 19, 1991.[4] and (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such law existed on June 19, 1991, shall be reinstated on motion by the plaintiff not later than 60 days after Dec. 19, 1991. 15 U.S.C. § 78aa-1.[5] The

[4] The Supreme Court announced its decision in Lampf on June 20, 1991.

[5] Also known as "Section 27A." Subsection (a) of this provision retroactively applies the previously applicable statute of limitations to those cases filed before June 19, 1991, which remained

statute's language is plain and unambiguous. It applies only to the claims of the parties in Lampf and to those lawsuits which were dismissed as a result of Lampf's retroactive application. The statute commands the Federal courts to reinstate cases which those courts have dismissed. Where the word "shall" appears in a statutory directive, "Congress could not have chosen stronger words to express its intent that [the specified action] be mandatory. . . ." United States v. Monsanto, 491 U.S. 600, 109 S.Ct. 2657, 2662 (1989).

Refreshingly, none of the litigants at our bar has suggested that § 27A means anything other than what it plainly says. This is certainly not a case in which the issue of separation of powers comes before the [c]ourt clad, so to speak, in sheep's clothing: [where] the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. Morrison v. Olson, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). If Justice Scalia, the lone dissenter in Morrison, thought that the challenged independent counsel law was a wolf which came "as a wolf," id., we think that § 27A comes as a camel, one that has forcibly and quite unapologetically thrust its nose into the tent of the judicial branch.

A. A brief historical background.

To answer the question upon which the constitutionality of § 27A hinges, we must reach far back into American legal history. During the first century or so of colonial government, legislative edicts requiring courts to reopen, vacate, rehear, or even reverse settled decisions upon the petition of the aggrieved losing party were not

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pending in the courts. The parties do not dispute this subsection; we therefore do not address it.

uncommon.[6] Noting the apparent prevalence of legislative adjudication of private disputes and grievances in the early colonial period, historians have concluded that such action did not offend the legal or political sensibilities of the time.[7] However, these sensibilities changed considerably during the years following the outbreak of the Revolutionary War, particularly with the escalation of legislative interference in private disputes which occurred during the time of the Articles of Confederation, notably and most frequently to grant debtors "relief" from creditors.[8] "Once legislative interference in judicial matters had intensified as never before in the eighteenth century, a new appreciation of the role of the judiciary in American politics [began] to emerge." Id. at 454.

The transformation of the legislature from its occasional role as an informal court of last resort, dishing out

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[6] See Gordon v. Wood, Creation of the American Republic 154-55 (1969); Judicial Action by the Provincial Legislature of Massachusetts, 15 Harv.L.Rev. 208 (1901-02).

[7] See, for example, Creation, supra note 6 at 154 ("[T]he assemblies in the eighteenth century still saw themselves . . . as a kind of medieval court making private judgments as well as public law . . . . Such assumption of traditional gubernatorial and judicial authority . . . did not seem to be usurpations. . . ."); see also E.S. Corwin, 1 Corwin on the Constitution 59-60 (1981).

[8] Wood, supra note 6 at 404-07, 454. As an example, Professor Wood describes the problem which persisted in Vermont at this time: The legislature, charged the Vermont Council of Censors, was reaching for "uncontrolled dominion" in the administration of justice: becoming a court of chancery in all cases over pounds sterling 4,000, interfering in causes between parties, reversing court judgments, staying executions after judgments, and even prohibiting court actions involving bonds or debts, consequently stopping nine-tenths of all causes in the state. In their assumption of judicial power the legislators had determined every cause, said the Council, guided by no rules of law but only by their crude notions of equity, "or in other words, according to their sovereign will and pleasure." Id. at 407 (quoting Address of the Council of Censors, Feb. 14, 1786, in Slade, ed., Vermont State Papers at 537).

equitable relief to particularly aggrieved citizens, to a "department [which] is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex," as James Madison described the legislative element of government in The Federalist 48, deeply concerned the fledgling Nation's leaders, most notably those who met in Philadelphia in 1787 to revise the Articles of Confederation. Their concern translated into many of the Constitution's specific enumerations of and limitations on power, as well as the "political truth" embodied in the document that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny" and that "the preservation of liberty requires that three great departments of power should be separate and distinct." The Federalist 47 (James Madison).

Defending the Constitution against charges that its provisions did not ensure adequate separation among the branches, Madison explained that good government did not require its departments to be "totally separate and distinct from one another." The nature of the power exerted, not the person or body exerting it, mattered: "[W]here the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted." Federalist 47. In the specific context of the separation between legislature and judiciary, he noted, "[t]he entire legislature can perform no judiciary act"; pursuing the point, he quoted Montesquieu: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator." Id.

In illustrating the dangers of the "encroaching spirit of power," Madison emphasized the dynamic counterbalancing the Constitution envisioned among the branches of government, which he immortalized concisely in declaring that "[a]mbition must be made to counteract ambi-

tion." Federalist 48, 50. He cited first the example of Virginia, where that Commonwealth's constitution prescribed the separation of powers, but where Jefferson had complained that "no barrier was provided between these several powers." Federalist 48 (quoting Thomas Jefferson, Notes on the State of Virginia (1784)). Madison noted that Jefferson had observed, with concern, that the Virginia legislature had "in many instances, decided rights which should have been left to judiciary controversy. . . ." Id. Madison pointed out the same dangerous trend in Pennsylvania where "the [State] Constitution had been flagrantly violated by the legislature in a variety of important instances," including where "cases belonging to the judiciary department [had been] frequently drawn within legislative cognizance and determination." Id. "The conclusion," Madison summarized, which I am warranted in drawing from these observations is that a mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands. Id.

B. The Separation of Powers Applied and Enforced.

After the States ratified the Constitution, it did not take long for fears of legislative encroachment on the judiciary's sphere of action to be realized. In 1791, Congress enacted a scheme by which disabled Revolutionary War veterans could apply for pensions. Veterans were to make application to the Federal Circuit Courts, which would then accept (or reject) their asserts that they were actually veterans, and render judgments as to the amount of pension appropriate to their disabilities. However, Congress gave the Secretary of War the final say; he could deny pensions where he suspected "imposition or mistake." Hayburn's Case, 2 U.S. (2d Dall.) 409 (1792), as described in 13 Charles A. Wright et al., Federal Practice and Procedure § 3529.1 at 302 (1984).

At that time, the Justices of the Supreme Court "rode circuit" and comprised the Federal Circuit Courts, sitting with District Court judges. The (then) five Justices of the Supreme Court were confronted with the pension act while sitting with three District Court judges on separate Circuit Court panels convened in New York, Pennsylvania, and North Carolina. Each panel independently and unanimously declined to hear the veterans' petitions, reasoning that for the courts to render judgments subject to review by the Congress was violative of the separation of powers.[9] This result was in essence the Court's first invalidation of an act of Congress. No doubt recognizing the gravity of this situation, both the Pennsylvania and North Carolina panels sent letters, jointly authored by the sitting judges, to President Washington informing him directly of their respective decisions and explaining the reasoning behind their objections.[10]

The Justices sitting in New York noted [t]hat by the Constitution of the United States, the government thereof is divided into three distinct and independent branches,

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[9] The U.S. Attorney General then brought a motion for a writ of mandamus before the Supreme Court at its next term, which the Court denied since the motion was made ex officio rather than on behalf of an actual petitioner. Unfazed, the Attorney General subsequently brought another motion for a writ of mandamus, this time on behalf of a particular applicant, William Hayburn, and asked the Supreme Court to order the courts to entertain the veterans' applications. The Court issued an opinion declaring that it would hold the motion under advisement until the next term; by that time, however, Congress had enacted an alternative system for providing the pensions. See Hayburn's Case, 2 U.S. 409.

[10] These letters, along with the opinion of the New York circuit panel, were published as a note to the Supreme Court's opinion issued in reponse to the Attorney General's second mandamus motion. While the Court did not specifically pass on the constitutionality of the act, as explained in note 9, the opinions rendered in Hayburn's Case "have since been taken to reflect a proper understanding of the role of the Judiciary under the Constitution." Morristown v. Olson, 487 U.S. 654, 677 n. 15 (1988).

and that it is the duty of each to abstain from, and to oppose, encroachments on either. . . . [The Act] subjects the decisions of these courts, made pursuant to those [judicial] duties, first to the consideration and suspension of the secretary of war, and then to the revision of the Legislature; whereas, by the constitution, neither the secretary of war, nor any other executive officer, nor even the Legislature. are authorized to sit as a court of errors on the judicial acts or opinions of this court. Hayburn's Case, 2 U.S. at 409-10 n. 2.

Similarly, the Justices sitting in Pennsylvania went straight to the heart of the matter. They noted that "the people of the United States have vested in Congress all legislative powers granted in the constitution" and have vested in the courts "the judicial power of the United States." Hayburn's Case, 2 U.S. at 410 n. 2. It is a principle important to freedom, that in government, the judicial should be distinct from, and independent of, the legislative department. . . . [The people] have placed their judicial power not in Congress, but in "courts." Id. Holding that the Act required judges to carry out "business . . . not of a judicial nature," the Justices went on to explain how the Act, if executed as Congress prescribed, offended the separation of powers: [I]f . . . the court had proceeded, its judgments (for its opinions are its judgments) might, under the same act, have been revised and controlled by the legislature, and by an officer in the executive department. Such revision and control we deemed radically inconsistent with the independence of that judicial power which is vested in the courts; and, consequently, with that important principle which is so strictly observed by the constitution of the United States. Id. The North Carolina court echoed this interpretation: [N]o decision of any court of the United States can, under any circumstances, in our opinion, agreeable to the constitution, be liable to a reversion, or even suspension, by the legislature itself, in whom no judicial power of any kind appears to be vested. . . . Id. With this unprecedented, "painful" rul-

ing, the Justices, some of whom had been at the Philadelphia Convention, made it clear that the Federal judiciary power, while defined in its reach by the Congress, could not be exercised by that body. The Court anchored its holding in the Constitution's succinct sentences vesting the legislative and judicial powers in their respective branches, and, necessarily, in the historical and theoretical understanding of the nature of the judicial power which had been incorporated into the Constitution.

III.

We have devoted several pages to Hayburn's Case and the background of the constitutional separation between the legislature and the judiciary, not to kill trees, but to illustrate that the Supreme Court has from the beginning maintained the rule that Congress may not retroactively disturb final judgments of the Federal courts, and to explain the Court's adherence to that rule as a protection of the separation of powers. We search in vain for an instance where the courts have permitted Congress retroactively to disturb final judgments rendered in cases between private litigants.[11] If the statute which gave rise to

[11] Excepting, of course, the various courts which have found § 27A constitutional. See, e.g., TGX Corp. v. Simmons, No. 92-3375, 1993 U.S.App. LEXIS 18359 (5th Cir July 20, 1993); Cooke v. Manufactured Homes, Inc., No. 93-1005, 1993 U.S.App. LEXIS 17167 (4th Cir. July 9, 1993); Cooperative de Ahorro y Credito Aguada v. Kidder, Peabody & Co., 993 F.2d 269 (1st Cir. 1993); Berning v. A.G. Edward & Sons, Inc., 990 F.2d 272 (7th Cir. 1993); Gray v. First Winthrop Corp., 989 F.2d 1564 (9th Cir. 1993); Anixter v. HomeStake Production Co., 977 F.2d 1533 (10th Cir. 1992), cert. denied, 113 S.Ct. 1841 (1993); Henderson v. Scientific-Atlanta, 971 F.2d 1567 (11th Cir. 1992), petition for cert. filed, June 25, 1993. Insofar as these courts have specifically addressed § 27A(b) rather than placing a blanket imprimatur on § 27A in its entirety, these opinions generally reflect the view that in enacting subsection (b), Congress simply acted within its powers to "change the underlying law" and apply the change retrospectively. We strongly disagree with the rationale behind these decisions, but we will refrain from critiquing each of them point by point; we believe

Hayburn's Case violated the Constitution, then § 27A(b) cannot stand, a fortiori. Reserving to Congress the power to "suspen[d]" and "revis[e]" decisions of the Supreme Court which had interpreted and applied valid Federal law would enable the Congress to sit as a "court of errors." In enacting § 27A, Congress has not simply reserved such power, as in Hayburn's Case, but actually exercised it. Since we cannot say that the fundamental natures of the legislative and judicial powers have somehow changed since 1792, we cannot square § 27A(b) with Hayburn's Case. The dangers to judicial independence in a system of separate powers remain; we are no more willing to ratify a legislative usurpation of the judicial power today than the Court was in 1792.[12]

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our reasoning speaks for itself. Of course, we are also well aware of the multitude of District Court opinions on the subject.

[12] See also McCullough v. Commonwealth of Virginia, 172 U.S. 102 (1898), in which the Court reviewed a Virginia statute which effectively nullified bonds issued by the Commonwealth. State and Federal courts had previously adjudged the bonds to be fully negotiable. The Court held, among other things, that [i]t is not within the power of a legislature to take away rights which have been once vested by judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases. McCullough, 172 U.S. at 123-24. The Government asserts that McCullough, which the District Court cited in holding § 27A(b) to be unconstitutional, was the only occasion where the Supreme Court held a statute unconstitutional under the "vested rights doctrine." Even if this be the case, we confess ignorance of the rule implied in the Government's argument that a single, unreversed decision of the Supreme Court is not binding on the District Court, or on us. We do not base our decision primarily on this so-called "vested rights doctrine," despite its prominent separation of powers component, because the asserted ability of Congress to disturb rendered final judgments does not hinge on the nature of the judgment and its property value to the prevailing litigant, a central rationale of the vested rights doctrine. However, we note that McCullough remains good law, including the holding quoted above, even if the Supreme Court has not ruled on a similar case since. See Georgia Ass'n of Retarded Citizens v.

The shareholders cite several cases they believe illustrate exceptions to this longstanding rule. They argue, in essence, that because Congress has the power in certain circumstances to affect the application or effect of judicial actions, this power necessarily extends to all judgments, including the final judgments of the Federal courts.[13] Intervening on behalf of the shareholders, the United States argues that in fact no such rule has survived at all. However, we believe the rule to be not only alive but vital to the continuing integrity of the independent Federal judiciary; further, we believe no true exceptions to the rule exist. Not only is each case cited by shareholders and the Government distinguishable, but the Supreme Court has taken great pains to reinforce the final judgment rule in every instance where it has been invoked.

The Government completely mischaracterizes the cases it cites in support of its argument that "the Supreme Court has explicitly upheld a wide range of federal and state statutes that have divested litgants of final judgments." For example, the Government cites Pennsylvania v. Wheeling and Belmont Bridge Co. (the Wheeling Bridge Case),

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McDaniel, 855 F.2d 805, 810 (11th Cir. 1988); Daylo v. Administrator of Veterans' Affairs, 501 F.2d 811, 816 (D.C.Cir. 1974).

[13] As proof that no judgments are truly "final," shareholders and the Government point to Fed.R.Civ.P. 60(b), which allows a court the discretion to "relieve a party . . . from [a] final judgment" it has previously rendered, on motion from a party, where any or all of a number of factors, such as mistake, fraud, or new evidence, show that the original judgment was somehow tainted or unfair. This argument completely misses the crucial point that Rule 60(b) in no way threatens judicial autonomy or implicates the separation of powers. The question is not whether the courts may disturb final judgments, but whether Congress may disturb them. See Treiber v. Katz, 796 F.Supp. 1054, 1062 n. 7 (E.D.Mich. 1992) ("[T]he Court's authority to set aside its own final judgment . . . is profoundly different from a legislative decree requiring courts to set aside final judgments."). To put this irresponsible argument in proper perspective, surely the Government would not argue that just because the Supreme Court can nullify legislation by declaring it to be violative of the Constitution, so can the President.

59 U.S. (18 How.) 421 (1856), which involved a bridge that defendants had built at the behest of the Commonwealth of Virginia spanning the Ohio River. In an earlier action, Pennsylvania had succeeded in getting the Supreme Court to declare the bridge an "obstruction of the free navigation of the . . . river" which harmed commerce in Pennsylvania; the Court granted injunctive relief requiring that the bridge be torn down or rebuilt with sufficient height to permit riverboat traffic. Id. at 429. The Court also awarded costs to the plaintiff. Id. In response, an act of Congress was passed declaring the bridge to be a "lawful structure," declaring the bridge and the roads it connected to be a Federal post road, and requiring riverboat operators not to interfere with the construction or operation of the bridge. Id. Pennsylvania nonetheless moved the Court to enjoin the rebuilding of the bridge (which a storm had since destroyed), arguing both that the new act of Congress was inconsistent with the free navigation of the river which Congress had guaranteed by previous enactment, id. at 430, and that the new act of Congress could not have the effect and operation of annulling the prior judgment of the Court, id. at 431.

Congress has the power "to regulate the navigation of the river," the Court noted; it similarly has the power "to regulate commerce among the several States." Wheeling Bridge, 59 U.S. at 430, 431. Since Congress ultimately controls both these powers, its retroactive legalization of the bridge "modifies" its previous enactments ensuring free navigation; "although it still may be an obstruction in fact, [it] is not so in contemplation of law." Id. at 430. Thus, Pennsylvania's injunctive relief, which entitled it to demand that the builders alter or destroy the bridge as necessary to preserve Congress's mandate that there be unhindered navigation of the Ohio River, had no force once Congress had redefined the river's navigability to include the presence of the bridge.

Since injunctive relief necessarily depends on a continuing affront to one's legal rights, while legal relief

depends only on a judicial determination that one's legal rights have been violated with resulting cognizable damage to the claimant, Congress could permissibly change the law so as to deprive a party of its right to injunctive relief. However, the Wheeling Bridge Case does not, as the Government would have us believe, therefore hold that Congress may act to deprive all parties of final judgments rendered in their favor. The Wheeling Bridge Court not only recognized but stressed this distinction, and took the opportunity to restate, in the strongest terms, the general rule against legislative modification of settled judgments: But it is urged that the Act of Congress cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby in favor of the plaintiff. This, as a general proposition, is certainly not to be denied, especially, as it respects adjudication upon the private rights of parties. When they have passed into judgment, the right becomes absolute, and it is the duty of the court to enforce it. . . . [I]f the remedy in this case had been an action at law, and a judgment rendered in favor of the plaintiff for damages, the right to these would have passed beyond the reach of the power of Congress. It would have depended, not upon the public right of the free navigation of the river, but upon the judgment of the court. Wheeling Bridge, 59 U.S. at 431.

In other words, had Pennsylvania claimed that it had lost, say, a million dollars in tax revenues as a result of the obstruction, and had the Court affirmed a judgment against the bridge company in that amount prior to the Congress's taking any further action, Congress could not permissibly enact a bill which vacated, reversed, or otherwise disturbed that money judgment. Indeed, the Court noted that the costs it had granted Pennsylvania "st[ood] upon the same principles" and were not affected by the subsequent legislation. Id. The "judgment of the court" results from the court's exercise of judicial power to apply

the law in existence at the time of judgment to the facts presented, and to reassign property rights as necessary to satisfy the law. Disputed property rights, such as claims for damages, thus become settled, and are entitled to the judiciary's protection and enforcement.

The continuing vitality of the rule against disturbing final judgments notwithstanding, shareholders and the Government nonetheless attempt in the alternative to distinguish the present case, arguing that a judgment rendered in favor of defendants on the basis of a time bar does not have the same finality as a judgment rendered "on the merits." We do not question the traditional legislative power to amend, repeal, or even extend statutory time limits. Where Congress changes or supersedes such time limits, no litigant can properly assert a continuing or vested "right" to the old time limit. See United States v. The Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801); Campbell v. Holt, 115 U.S. 620 (1885); Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945). However, we reject the Government's argument, based on Congress's power to amend statutes of limitation, that "[a] judgment resting on a statute of limitations is no more 'fundamental,' and no more immune from legislative revision, than the statute of limitations itself." Perhaps vaguely aware of the enormous consequences which would result to our system of government were the Congress's undisputed power to change the existing laws extended to allow it retroactively to change the prior application of those laws by the courts, the Government attempts to limit its argument to "technical, non-substantive" laws such as statutes of limitation and repose.

To repeat, we fail to identify a single case (besides the ones holding § 27A to be constitutional) which has held that the decision of a Federal court adjudging a claim to be time-barred is not a final judgment. Again, the cases cited by appellant and the Government hold only that statutes of limitation are "arbitrary enactments by the

law-making power," "good only be legislative grace" and may be changed by Congress and applied retroactively to pending cases. Campbell, 115 U.S. at 628; Chase Securities, 325 U.S. at 314. In Chase Securities, for example, the Court noted that the Minnesota courts (whence the appeal arose) had not finally determined whether the plaintiff's case was time-barred, thus the case was not one where a defendant's statutory immunity from suit had been fully adjudged so that legislative action deprived it of a final judgment in its favor. Chase Securities, 325 U.S. at 310. While the Chase Securities decision's description of the legislature's power to change statutes of limitations retroactively is indeed sweeping, this language conclusively shows both that the Court believed dismissals of time-barred claims to be "final judgments" and that the Court did not view this legislative power as extending to require that courts substitute a new limitation period in cases finally decided under a previously applicable one. See also Campbell, 115 U.S. at 628 ("[S]tatutes, shortening the [limitation] period or making it longer, which is necessary to its operation, have always been held to be within the legislative power until the bar is complete.") (emphasis added).

Thus, there is no principled basis on which to defend either the Government's proposed rule or, for that matter, its proposed limitation. Congress may change an established time bar, even with the effect of reviving claims that would otherwise remain "dead" due to the lapse of time. But where the courts have adjudged a claim to be time-barred, Congress cannot compel the courts to reopen a settled judgment and apply the subsequent change in place of the time bar that originally resolved the case, even by giving the new provision retroactive effect. Where a Federal court enters judgment in a case on the basis of a time bar, it confers upon the prevailing party a right based on the protections that the time bar provides. Applying the general principles of existing law to specific

circumstances, and enforcing the rights between parties created thereby constitute the essence of the judicial power.

IV.

In only one context has the Supreme Court ratified acts of Congress which specifically required the courts to reconsider issues which had been previously adjudicated and upon which the courts had rendered a final judgment. The shareholders and the Government argue that these cases instruct our present situation; we read them as applying very narrowly, and as standing on a distinct and specifically enumerated constitutional power of Congress. Where the United States has been party to a lawsuit, and the court has rendered judgment in favor of the United States, the Supreme Court has recognized Congress's power to authorize relitigation of the same issues, and have the courts apply such new law as Congress passes retroactively to the same case. While such legislation erases the effects of judgments of the Federal courts, it does not trespass upon the power of the judiciary; the Court has viewed such an act as tantamount to a waiver of liability by the Government, and has ratified such an act as a permissible exercise of Congress's explicit Article I power to pay the debts of the United States.

The shareholders and the Government cite the recent Supreme Court decision in Robertson v. Seattle Audubon Society, 112 S.Ct. 1407 (1992), and its decision in United States v. Sioux Nation of Indians, 448 U.S. 371 (1980), to show that the Constitution does not prohibit Congress from reopening final judgments of the Federal courts. In Seattle Audubon, the Court approved an act of Congress which had amended laws specifying what areas of the Northwest national forests, eco-realm of the elusive northern spotted owl, could be logged. As part of this provision, Congress "determin[ed] and direct [ed]" that the new specifications apply to two cases which the

statute noted by name. Seattle Audubon, 112 S.Ct. at 1411-12, nn. 1-3. In Sioux Nation, Congress acted to permit the plaintiff Indians, who had been pressing their claims in court for nearly a century, and who had lost appeals before the Supreme Court twice before, to relitigate before the Court of Claims; the statute directed the Court of Claims to review the case anew without regard to the prior judgments that the claims court and the Supreme Court had previously rendered in favor of the Government. Sioux Nation, 448 U.S. at 389. The Supreme Court upheld that statute as well.

Neither case stands in opposition to the Court's long-standing rule against Congressional interference with the settled judgments of the Federal courts. In neither instance did Congress compel the Federal courts to vacate, revise, or reconsider final judgments rendered in cases between private parties. The cases Congress named specifically in the statute considered in Seattle Audubon were pending cases, not decided cases. Indeed, the petitioners challenged the statute on the grounds that Congress had infringed on the judiciary power by prescribing the rule of decision in those cases in contravention of the Klein doctrine,[14] not that Congress had interfered with settled judgments. Seattle Audubon, 112 S.Ct. at 1414-15.

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[14] United States v. Klein, 80 U.S. (13 Wall.) 128 (1871) established the rule that Congress cannot "prescribe a rule for the decision of a cause in a particular way." Klein, 80 U.S. at 146. After the Civil War, citizens of the former Confederacy could petition the Court of Claims under a 1863 law for a return of property, or proceeds therefrom, confiscated by Federal troops. The petitioners had to prove that they had not fought in the war, and had to prove their loyalty to the Union. Lincoln had issued a general pardon to any Southerner who swore loyalty to the Union. The Supreme Court held that a pardon served as sufficient proof of loyalty and non-combatant status. United States v. Padelford, 76 U.S. 531 (1869). In response to Padelford, Congress passed a new law which directed the Court of Claims to hold all such pardons inadmissible on behalf of the claimants for the purposes of these petitions; the possesion of such a pardon would instead be deemed proof of disloyalty. Klein

Sioux Nation answered directly the objection that Congress could not "disturb[ ] the finality of a judicial decree" under the longstanding rule set out in Hayburn's Case. Sioux Nation, 448 U.S. at 391-92. The Court disposed of the objection by framing the issue in terms of Congress's recognized power "to waive the res judicata effect of a prior judgment entered in the Government's favor on a claim against the United States." Id. at 396-97 (citing United States v. Cherokee Nation, 202 U.S. 101 (1906)). In approving this action, the Court in no way cast doubt on the continuing vitality of the rule in Hayburn's Case. The Court noted that it had in previous cases "affirm[ed] the broad constitutional power of Congress to define and 'to pay the Debts . . . of the United States.'" Id. at 397 (quoting U.S. Const., Art. I, § 8, cl. 1). Where Congress acts to allow litigants to reassert failed claims against the Government, it does not interfere with the administration of justice. Congress are here to all intents and purposes the defendants, and as such they come into court through this resolution and say that they will not plead the former trial in bar, nor interpose the legal objection which defeated a recovery before. Nock v. United States, 2 Ct.Cl. 451, 457-58 (1867) (approving a joint resolution of Congress authorizing the Court of Claims to reconsider a claim against the United States previously decided in favor of the Government, and to decide the claim "in accordance with the principles of equity and justice") (quoted in Sioux Nation, 448 U.S. at 398). Since waiving the defense of

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held the new law unconstitutional as a legislative subversion of the judicial function. While the Klein doctrine similarly protects the judiciary power from legislative encroachment, we believe § 27A(b) forces the courts to rule again on cases they have dimissed with prejudice, not that it force the courts to rule on those cases (or any cases) in a particular way. But see Henderson v. Scientific-Atlanta, 971 F.2d 1567, 1576 (Wellford, J., dissenting) (Section 27A violates Klein doctrine).

res judicata does not "reverse[ ] a decree of [a] court," Sioux Nation, 448 U.S. at 398 (quoting Nock, 2 Ct.Cl. at 457-58), statutes in which Congress imposes upon itself "a legal, in recognition of a moral, obligation to pay" claims against it do not "encroach upon the judicial function which . . . had previously [been] exercised in adjudicating that the obligation was not legal" and are therefore permissible. Id. at 401 (quoting Pope v. United States, 323 U.S. 1, 9-10 (1944)). We do not see this recognition of a constitutionally enumerated power of Congress as creating an exception to the longstanding rule against disturbing judgments rendered in favor of private parties, much less as a rejection of that rule, as the Government suggests. Indeed, the Sioux Nation case allows Congress the power only to ratchet the Government's liability to claimants in favor of private parties; Congress may not disturb final judgments rendered against the United States, since to allow this power would be to permit Congress to act as a judge in its own case to decide a dispute in its favor. Id. at 404-05 (citing Klein).

Needless to say, the very existence of this appeal suggests that defendants have not chosen to waive their defenses of res judicata with which the District Court vested them in dismissing the shareholders' case with prejudice as time barred. Appellants here simply fail to draw a defensible constitutional parallel between judgments rendered in favor of the United States and judgments rendered in favor of private parties.

V.

We strongly object to the idea put forth by the Government that the judgment rendered in favor of the defendants by the District Court was not truly "final" because of the speed with which Congress acted to undo that judgment. Some final judgments are less final than others only to the extent that some pregnant women are less pregnant that others. The vesting of rights in parties

to judgment does not depend upon the consent of Congress, tacit or explicit. And a subsequent act of Congress purporting to divest those rights violates the Constitution regardless of the haste with which the vote is taken and the act signed into law.

The shareholders and the Government argue that Congress could properly remedy the "windfall" that Lampf bestowed upon the defendants here and in similar actions. True, the litigants had proceeded under the assumption that the Kentucky Blue Sky law would apply, but the Supreme Court read the Federal securities laws differently.[15] Once the Court had determined the rights of the parties in Lampf, those parties' rights were fixed; similarly, once the District Court applied Lampf to dismiss with prejudice the present litigation, and that decision was not appealed, the rights of these parties were fixed, and the shareholders' claims forever precluded. Without a doubt, certain members, and presumably a majority, of Congress believed these results to be unfair, and, as the Government argues, a "windfall" for the respective defendants.[16] However, Congress may not retro-

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[15] And, we note, correctly, according to Congress. In enacting § 27A, Congres did not "change the underlying law" by repealing, amending or replacing the one year/three year time bar the Lampf Court derived from the securities laws, but eliminated only the applicability of that time bar, both to the claims asserted in Lampf itself and to all cases dismissed by the retroactive application of Lampf. This act of Congress does nothing more than command the courts to ignore (for a while) a valid judgment of the Supreme Court, adding salt to an already grievous wound.

[16] See, for example, the comments of Senator Bryan in support of § 27A: The Supreme Court's decision in Lampf, June 20, 1991, in effect frees Michael Milken and scores of other felons and defendants of responsibility to pay back the people they had swindled. It would be a monstrous injustice that the icons of [g]reed in effect escape responsibility by reason of a Supreme Court decision that is given retroactive application. All we seek is to give the victims a fair day in court. 137 Cong.Rec. S18,624 (daily ed. Nov. 27, 1991).

spectively vacate decided cases, regardless of how compelling the perceived injustice visited upon the parties by a valid exercise of the judicial power.

VI.

Our system of Federal government vests in the Congress the legislative power, and in the Article III courts the judicial power. The Constitution makes this allocation of powers explicit, and there is nothing equivocal in its language. It is true that some recent decisions of the Supreme Court have evidenced a willingness to find that the separation of powers so "essential to the preservation of liberty," Mistretta v. United States, 488 U.S. 361, 380 (1989), is not offended so long as the actions of one branch do not involve an attempt to increase the powers of that branch at the expense of the powers of another branch, or usurp or impermissibly undermine the powers properly belonging to another branch. See generally Mistretta, 488 U.S. 361; Morrison v. Olson, 487 U.S. 654 (1988).

However, we believe that even if this trend by the Supreme Court may be said to vindicate the "a little separation is enough" view of this essential doctrine, the case at bar clearly represents the irreducible minimum of the separation required to preserve the system's last vestiges of federalism. For if Congress may by legislation reverse or vacate the final judgments of the Federal courts, then Congress has rendered the whole function of the judiciary futile: whether "the whole power of one department is exercised by the same hands which possess the whole power of another department," Mistretta, 488 U.S. at 381 (quoting The Federalist No. 47 (Madison)) is left subject only to the self-restraint of the legislature. As Jefferson wrote, Nor should our assembly be deluded by the integrity of their own purposes, and conclude that these unlimited powers will never be abused, because themselves are not disposed to abuse them. . . . The time

to guard against corruption and tyranny, is before they shall have gotten hold on us. It is better to keep the wolf out of the fold, than to trust to drawing his teeth and talons after he shall have entered. Thomas Jefferson, Notes on the State of Virginia, Query 13, 121 (1784) (reprinted in Ralph Lerner and Philip B. Kurland, eds., 1 The Founders' Constitution 320 (1987)).

Were the validity of the judgments of the judicial branch to depend on the approval of the legislative branch, how much more fully could the legislature increase its own powers at the expense of the judiciary, or usurp or undermine the powers properly belonging to the judicial branch? What part of the camel would then remain outside the tent?

Where Congress disagrees with the manner in which the judiciary has interpreted a statute, it may amend that statute so as to effect the proper congressional intent, and thus render the faulty judicial interpretation moot. But Congress may not require the Federal courts to nullify or vacate their properly-rendered judgments, regardless of what injustice Congress believes those judgments have visited upon private parties. As the judges writing to George Washington in Hayburn's Case sagely reflected, [I]t is as much our inclination, as it is our duty, to receive with all possible respect every act of the Legislature, and that we never can find ourselves in a more painful situation than to be obliged to object to the execution of any, more especially to the execution of one founded on the purest principles, of humanity and justice, which the act in question undoubtedly is. But, however lamentable a difference in opinion really may be, or with whatever difficulty we may have formed an opinion, we are under the indispensable necessity of acting according to the best dictates of our own judgment, after duly weighing every consideration that can occur to us; which we have done on the present occasion. 2 U.S. at 409-10 n. 2 (1792). Since § 27A(b) unambiguously requires

courts to do so, we hold that subsection to be an unconstitutional usurpation of the judiciary power. We accordingly AFFIRM the judgment of the District Court denying the shareholders' motion to reinstate their lawsuit.

KEITH, Circuit Judge, concurring in part and dissenting in part.

The crux of the majority's argument is that section 27A(b) violates the constitutional principle of separation of powers by asking courts to reverse final judgments. The majority essentially argues that section 27A(b) allows an impermissible reopening of adjudicated cases. Although I agree that section 27A(b) cannot be constitutionally applied to the plaintiffs in the instant case, I write separately because I do not believe that section 27A(b) violates separation of powers principles in all contexts. To the contrary, section 27A(b) is an example of Congress permissibly overriding a judicial interpretation of a statute, without violating principles of separation of powers.

The issue of finality is only relevant in this case because the plaintiffs did not appeal the district court's initial dismissal of their claim. If the plaintiffs had appealed that ruling, the judgment could not be considered "final" under any analysis, but instead "pending" until it had completed its way through the appellate process. In Gray v. First Winthrop Corp., 989 F.2d 1564 (9th Cir.1993), the Ninth Circuit held that section 27A(b) did not violate principles of finality for cases which had been appealed. The court stated that: These cases are properly construed as "pending" cases for separation of powers purposes. See Griffith v. Kentucky, 479 U.S. 314, 321 n. 6, 107 S.Ct. 708, 712 n. 6, 93 L.Ed.2d 649 (1987) (judgment is "final" and case is no longer pending only after "the availability of appeal [is] exhausted, and the time for a petition for certiorari [has] elapsed or a petition for certiorari finally [has been] denied"); see

also Georgia Ass'n of Retarded Citizens v. McDaniel, 855 F.2d 805, 813 (11th Cir.1988) ("When it so intends, [Congress'] ability to affect the content of a nonfinal judgment in a civil case, through retroactive legislation ceases only when a case's journey through the courts comes to an end."), cert. denied, 490 U.S. 1090, 109 S.Ct. 2431, 104 L.Ed.2d 988 (1989); de Rodulfa v. United States, 461 F.2d 1240, 1253 (D.C.Cir.) ("[T]he suit is pending until the appeal is disposed of, and until disposition any judgment appealed from it is still sub judice.") (internal quotations omitted), cert. denied, 409 U.S. 949, 93 S.Ct. 270, 34 L.Ed.2d 220 (1972). Id. at 1571.

The Seventh Circuit reached the same conclusion in Berning v. A.G. Edward & Sons, Inc., 990 F.2d 272 (7th Cir.1993). The court reasoned that, because the case was pending on appeal at the time that section 27A was passed, there was no final judgment to be upset. The court stated that: The principle that Congress may impose new legal rules applicable in pending cases was recognized by the Supreme Court almost two hundred years ago in United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110, 2 L.Ed. 49 (1801). Because Congress is free to make changes in the law applicable to pending civil cases, "[t]he legislature may change a statute of limitations at the last instant, extending or abrogating the remedy for an established wrong." Tonya K. ex rel. Diane K. v. Board of Education, 847 F.2d 1243, 1247 (7th Cir. 1988). Id. at 277.

In the case at hand, Congress was unable to protect these litigants under section 27A(b), because by the time 27A(b) was enacted, the time period for filing an appeal had passed. Nevertheless, for those litigants who did appeal the district court's initial dismissal of their claim, section 27A(b) does not disturb final judgments, and is therefore consistent with separation of powers requirements.

Courts are under a duty to impose a saving interpretation of an otherwise unconstitutional statute so long as it is "fairly possible to interpret the statute in a manner that renders it constitutionally valid." Seattle Audubon Soc'y v. Robertson, 112 S.Ct. 1407 (1992); Communications Workers of Am. v. Beck, 487 U.S. 735, 762 (1988). Accordingly, I would AFFIRM the judgment of the district court on the grounds that section 27A(b) cannot be constitutionally applied to the litigants in the instant case, but I would not find section 27A(b) unconstitutional as applied to litigants who appealed the initial dismissal of their claims.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action File

NO. 1:88-CV-2208-RLV

RUSSELL HENDERSON, *et al.*,
Plaintiffs,

vs.

SCIENTIFIC-ATLANTA, INC.,
Defendant.

PROTECTIVE MOTION FOR REINSTATEMENT
AND FOR STAY

[Filed Feb. 11, 1992]

In the event of the applicability of Section 27A(b) of the Securities Exchange Act of 1934, as amended, to this case pending on appeal, plaintiffs hereby move pursuant to that section that this Court reinstate the above-captioned case in its entirety. Such motion is made with leave from the Eleventh Circuit Court of Appeals and is without prejudice to the appeal pending in that Court. Therefore, upon filing this motion, plaintiffs move that any further action be stayed pending the resolution of the pending appeal.

Respectfully Submitted,

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APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 91-8938

RUSSELL HENDERSON, MILDRED E. CHAMBERS, and CHARLES E. MOORE, INDIVIDUALLY, AND AS CLASS REPRESENTATIVES,

Appellants,

VS.

SCIENTIFIC-ATLANTA, INC.,

Appellee.

PROTECTIVE MOTION FOR REINSTATEMENT

Come Now appellants, pursuant to Fed.R.App.P.27, 11th Cir.R. 27-1 and newly enacted section 27A(b) of the Securities Exchange Act of 1934, and move this Court, which is currently exercising jurisdiction over this case, as follows:

(a) By order issued September 30, 1991, and judgment entered on October 1, 1991, the United States District Court for the Northern District of Georgia, Atlanta Division dismissed as time-barred this private civil class action brought pursuant to § 10(b) of the Securities Exchange Act of 1934 ("1934 Act") and, as a consequence thereof, dismissed the pendent class action claim of common law fraud;

(b) Appellants timely filed their notice of appeal on October 23, 1991;

(c) While the parties were preparing their briefs in this expedited appeal, Congress passed and President Bush signed into law the Comprehensive Deposit Insurance Reform and Taxpayer Protection Act of 1991, section 476 of which added new section 27A to the 1934 Act;

(d) Appellants brought this new development constituting significant authority to the attention of this Court by letter dated December 20, 1991, to which appellants attached a copy of Section 27A;

(e) Section 27A has two subsections, one of which governs pending cases (§ 27A(a)) and the other of which governs dismissed cases (§ 27A(b));

(f) Section 27A(a) applies automatically to pending cases, but Section 27A(b) provides for reinstatement of dismissed cases upon motion within 60 days;

(g) Appellants consistently have maintained that this case is a pending case and subject to section 27A(a);

(h) In an abundance of caution, Appellants in their Reply Brief filed January 15, 1992, requested this Court to consider Appellants' Letter of December 20, 1991, and their Reply Brief as a motion under Section 27A(b), if such a motion were necessary in the event that this Court were to rule Section 27A(a) inapplicable;

(i) In further caution, and to preserve and secure all of Appellants' rights under Section 27A pending the appeal in this Court, and without an any manner moving to have this appeal dismissed or stayed, Appellants are seeking leave of this Court to file, pursuant to Section 27A(b), a protective motion in the district court moving for reinstatement of this action, with action on that protective

motion to be stayed pending the ruling by this Court in the pending appeal, including the application and the constitutionality of section 27A of the 1934 Act, as amended;

(j) In further caution, because section 27A(b) does not specify the court in which any motion for reinstatement must be filed, and because this Court is exercising jurisdiction of this case on appeal, and without waiving Appellants' position that a proper motion has already been made in this Court through the letter to this Court dated December 20, 1991, and Appellants' Reply Brief filed January 15, 1992, Appellants file this motion for reinstatement pursuant to section 27A(b) in the event that this Court rules that section 27A(a) is inapplicable;

(k) Appellants file this motion for reinstatement to preserve and secure all of appellants' rights under section 27A pending the appeal in this Court, and in so filing do not move to have this appeal dismissed or stayed.

Wherefore, appellants move this Court to receive this protective motion for reinstatement as timely filed pursuant to Section 27A(b) and, in the event that the Court rules that resort to Section 27A(b) is necessary, grant this motion and reinstate this action in its entirety.

Respectfully Submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

SCIENTIFIC-ATLANTA, INC.,
Petitioner,

v.

RUSSELL HENDERSON *et al.*
Individually and as Class Representatives,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. A CLEAR CIRCUIT CONFLICT ON A FUNDAMENTAL CONSTITUTIONAL ISSUE WARRANTS THIS COURT'S IMMEDIATE ATTENTION	1
II. NONE OF THE ARGUMENTS RAISED BY RESPONDENTS OR THE UNITED STATES REFUTES THE CIRCUIT CONFLICT	4
CONCLUSION	8

TABLE OF AUTHORITIES

Cases — Page

Bradley v. School Board of City of Richmond, 416 U.S. 696 (1974) 6
Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798) 4
Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945) 7
Hayburn's Case, 2 U.S. (2 Dall.) 408 (1792) 1, 2
Henderson v. Scientific-Atlanta, Inc., 971 F.2d 1567 (11th Cir. 1992), *petition for cert. filed*, 62 U.S.L.W. 3002 (U.S. July 6, 1993) (No. 92-2061) ..... *passim*
International Union of Electrical, Radio and Machine Workers v. Robbins & Myers, Inc., 429 U.S. 229 (1976) 7
James B. Beam Distilling Co. v. Georgia, —— U.S. ——, 111 S. Ct. 2439 (1991) 3
Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, —— U.S. ——, 111 S. Ct. 2773 (1991) 3
Morrison v. Olson, 487 U.S. 654 (1988) 2
Musick, Peeler & Garrett v. Employers Insurance of Wausau, —— U.S. ——, 113 S. Ct. 2085 (1993) 5, 6
Plaut v. Spendthrift Farm, Inc., No. 92-5591, 1993 WL 290399 (6th Cir. Aug. 3, 1993) ..... *passim*
Robertson v. Seattle Audubon Society, —— U.S. ——, 112 S. Ct. 1407 (1992) 7
United States v. National Bank of Commerce, 472 U.S. 713 (1985) 6
United States v. The Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801) 6

Statutes

Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 476, 105 Stat. 2236, 2387 (1991) ..... *passim*

Miscellaneous

Federal Rule of Appellate Procedure 35(c) 4, 5
T. Cooley, *Constitutional Limitations* (1868) 3, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-2061

SCIENTIFIC-ATLANTA, INC.,
Petitioner,

v.

RUSSELL HENDERSON *et al.*
Individually and as Class Representatives,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF

ARGUMENT

I. A CLEAR CIRCUIT CONFLICT ON A FUNDAMENTAL CONSTITUTIONAL ISSUE WARRANTS THIS COURT'S IMMEDIATE ATTENTION.

1. There is a clear circuit conflict between the decision below and the Sixth Circuit ruling in *Plaut v. Spendthrift Farm, Inc.*, No. 92-5591, 1993 WL 290399 (6th Cir. Aug. 3, 1993) (included as Appendix A and discussed in Petitioner's Supplemental Brief, filed Aug. 25, 1993). The Sixth Circuit's decision in *Plaut* and Scientific-Atlanta's Petition for Certiorari are both based on the well-established separation of powers doctrine, as explained by this Court in *Hayburn's Case*, 2 U.S. (2 Dall.) 408, 413 (1792) ("no decision of any court of the United States

can, under any circumstances, . . . be liable to a revision, or even suspension, by the legislature itself, in whom no judicial power of any kind appears to be vested").

2. Neither the United States's Brief nor the Respondents' Brief in Opposition even addresses *Hayburn's Case*, which has been cited as authority by this Court in a separation of powers case as recently as 1988. *See Morrison v. Olson*, 487 U.S. 654, 677-78 n.15 (1988).[1] The United States argues instead that Section 27A "belongs to the large category of statutes that alter the law in response to judicial interpretation." United States Opp'n Brief at 8; *see also Henderson v. Scientific-Atlanta, Inc.*, 971 F.2d 1567, 1571 n.4 (11th Cir. 1992) ("Section 27A is a classic example of Congress's practice of 'overruling' a statutory construction by the Supreme Court.").

3. This reasoning ignores the separation of powers doctrine upon which the Sixth Circuit's decision in *Plaut* and Scientific-Atlanta's Petition for Certiorari are both primarily based, and highlights the significance of the constitutional controversy presented by this case. As argued in the Petition (Pet. at 11-20), accepting the view of separation of powers espoused by the majority opinion below (and now reiterated by the United States and Respondents) would eliminate any meaningful constraints on congressional power to revise and suspend this Court's judgments, to ordain that the courts reach specific resullts in designated cases, to revise or alter judicial retroactivity rules inherent in basic norms of constitutional adjudication, or to demand that the courts utilize decisional approaches prescribed by Congress contrary to the decisions of this Court. The sole apparent limitation upon congressional powers lies in whether the form utilized by the legislature

[1] The only citation to *Hayburn's Case* in either Brief in Opposition is in a footnote to Respondents' apparently pejorative textual reference to "certain decisions from past centuries." Respondents Opp'n Brief at 20.

is statutory; if so, according to the majority below as well as the United States and Respondents, no inquiry need be made into the substance of the legislation. *But see* T. Cooley, *Constitutional Limitations* 94-95 (1868).

4. As previously established (*see* Petitioner's Supplemental Brief), this fundamental difference in approach to separation of powers applies to the entirety of Section 27A, and not to any discrete subsection thereof.[2] The Sixth Circuit noted the breadth of its holding in *Plaut*: "We strongly disagree with the rationale behind these decisions [upholding the constitutionality of Section 27A(a)], but we will refrain from critiquing each of them point by point; we believe our reasoning speaks for itself." *Plaut*, 1993 WL 290399 at *5 n.11 (Petitioner's Supplemental Brief at 11a). Under the Sixth Circuit's approach, Section 27A is recognized for what it actually purports to accomplish: a purely retroactive suspension of this Court's holdings in both *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, —— U.S. ——, 111 S. Ct. 2773 (1991) and *James B. Beam Distilling Co. v. Georgia*, —— U.S. —, 111 S. Ct. 2439 (1991). Regardless of

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[2] The United States repeatedly mischaracterizes Petitioner's constitutional challenge of Section 27A as challenging only Subsection 27A(a). *See, e.g.*, United States Opp'n Brief at 6 ("Petitioner Contends (Pet. 8-20) that Section 27A(a) [sic] violates the separation of powers."); *id.* at 6-7 ("As petitioner concedes (Pet. 9), there is no circuit split on the constitutionality of Section 27A(a) [sic]."; *id.* at 7 ("Petitioner argues (Pet. 11-15) that Section 27A(a) [sic] invades the judicial province by revising a judgment of this Court . . . ."). Each of the United States's purported citations to an argument in the Petition for a Writ of Certiorari about 27A(a) is in fact a citation to an argument about 27A *in toto*. As pointed out in Petitioner's Supplemental Brief, neither the Eleventh Circuit's decision below nor Scientific-Atlanta's Certiorari Petition distinguishes between subsections (a) and (b). *See Henderson v. Scientific-Atlanta, Inc.*, 971 F.2d 1567 (11th Cir. 1992), *petition for cert. filed*, 62 U.S.L.W. 3002 (U.S. July 6, 1993) (No 92-2061); Pet.; Petitioner's Supplemental Brief at 2; *see also* Appendix B and Appendix C to Petitioner's Supplemental Brief (copies of Respondents' pleadings below under Section 27A(b)).

its form, Section 27A is "judicial in its nature," *Calder v. Bull,* 3 U.S. (3 Dall.) 386, 398 (1798) (Iredell, J., concurring "in the general result," dissenting in part due to "the reasons that are assigned"), and this Court has never before sustained such an act of Congress against a separation of powers challenge.[3]

The rationale below is incompatible with any meaningful separation of powers doctrine. Like many of the older cases upon which Petitioner and the Sixth Circuit in *Plaut* rely, the separation of powers doctrine is admittedly a product of "past centuries." Respondents Opp'n Brief at 20. But so is the Constitution itself. Nothing less than preservation of the essential underlying scheme of our tri-partite government is implicated in this case.

II. NONE OF THE ARGUMENTS RAISED BY RESPONDENTS OR THE UNITED STATES REFUTE THE CIRCUIT CONFLICT.

Neither Respondents nor the United States offer any persuasive reasons why this circuit split, in and of itself, does not warrant immediate resolution by this Court.

1. The United States argues there is no "conclusive circuit conflict" because "[t]he Solicitor General has authorized the filing of a petition for rehearing *en banc* in *Plaut.*" United States Opp'n Brief at 7 n.6. There is absolutely no merit to this argument, particularly because the United States does not even claim to have filed or prepared a petition for rehearing. Even if the United States had *already* filed a petition for rehearing *en banc,* however, the Federal Rules of Appellate Procedure specify that such a petition "shall not affect the finality of the judgment of the court of appeals or stay the issuance of

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[3] Respondents complain that "Petitioner seeks to stand the separation of powers doctrine on its head." Respondents Opp'n Brief at 25. As misguided as this complaint is, it further highlights the conflict in the circuits. If Scientific-Atlanta would "stand the separation of powers doctrine on its head," the Sixth Circuit in *Plaut* already has done so.

the mandate." Fed. R. App. P. 35(c). The opinion of the Sixth Circuit in *Plaut* has not been vacated and may never be vacated.

2. The separate opinion of Judge Keith in *Plaut* highlights rather than negates a "conclusive circuit conflict." United States Opp'n Brief at 7 n.6. Judge Keith's separate opinion suggests that: (1) Section 27A(b) applies "to litigants who appealed the initial dismissal of their claims," such as Henderson *et al.*, below; and (2) the majority opinion in *Plaut* holds that 27A(b) is unconstitutional in such cases, a holding with which Judge Keith disagreed—hence the need for the separate opinion. *Plaut*, 1993 WL 290399 at *13 (Keith, J., concurring in part and dissenting in part) ("I would not find section 27A(b) unconstitutional as applied to litigants who appealed the initial dismissal of their claims.") (Petitioner's Supplemental Brief at 27a).

If Judge Keith had written the majority opinion in *Plaut*, Respondents might correctly assert that "[t]here is no conflict among the circuit courts of appeal as to the constitutionality of Section 27A with respect to pending cases." Respondents Opp'n Brief at 23. But Judge Keith's separate opinion confirms and accentuates that a circuit conflict exists—even with regard to pending cases.

3. Respondents appear to concede this direct circuit conflict (*see* Respondents Opp'n Brief at 6, 24 n.11), and further appear to allege a direct conflict between *Plaut* and this Court's decision in *Musick, Peeler & Garrett v. Employers Insurance of Wausau*, —— U.S. ——, 113 S. Ct. 2085 (1993). *Compare* Respondents Opp'n Brief at 7-8 ("This Court has already recognized the validity and effect of Section 27A." (citing *Musick*)) *with Plaut*, 1993 WL 290399 at *2 ("§ 27A comes as a camel, one that has forcibly and quite unapologetically thrust its nose into the tent of the judicial branch") (Petitioner's Supplemental Brief at 5a). Respondents attempt to dis-

tinguish *Plaut* by arguing that the defendants in *Plaut* did not have an appeal pending when Section 27A was enacted;[4] yet they ignore the irreconcilable conflict between the *reasoning* of *Plaut* and that of the majority opinion below and of the opinions of the other circuits that have upheld Section 27A. Respondents' reasoning would require that the Court ignore the deliberate breadth of the holdings of the Sixth and Eleventh Circuits themselves. When a circuit court opinion conflicts, "directly or in principle," with an opinion or opinions of other circuits, this Court has taken *certiorari*. *E.g., United States v. National Bank of Commerce*, 472 U.S. 713, 719 (1985).

4. Finally, the United States broadly asserts that "[i]t is integral to the judicial function to give effect to changes in the law that affect pending cases." United States Opp'n Brief at 14; *see also* Respondents Opp'n Brief at 21-23 (similar broad assertions). Such broad assertions do not alter the conflict in this case. Indeed, in the principal case upon which both the United States and Respondents rely, *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), Chief Justice Marshall distinguished "private cases between individuals," *e.g.*, Section 27A cases, from "great national concerns where individual rights acquired by war are sacrificed for national purposes . . .," *The Schooner Peggy*, 5 U.S. (1 Cranch) at 110.[5]

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[4] Such a distinction would turn on the fact that the plaintiffs in *Plaut* "did not file what they believed (correctly) would have been a meritless and indeed sanctionable appeal." *Plaut*, 1993 WL 290399 at *1 (Petitioner's Supplemental Brief at 3a-4a).

[5] *See Bradley v. School Board of City of Richmond*, 416 U.S. 696, 717 (1974) (recognizing *The Schooner Peggy* as distinguishing "private cases between individuals"); *cf. Plaut*, 1993 WL 290399 at *10 ("Appellants here simply fail to draw a defensible constitutional parallel between judgments rendered in favor of the United States and judgments rendered in favor of private parties.") (Petitioner's Supplemental Brief at 21a).

Relating this distinction to the constitutional separation of powers, Professor Cooley aptly describes legislation that retroactively revives a statute of limitations that has already run *between private parties* as "a thing quite beyond the power of legislation." T. Cooley, *Constitutional Limitations* 369. Not a single case cited by the United States or by Respondents, including this Court's recent decision in *Robertson v. Seattle Audubon Society*, —— U.S. ——, 112 S. Ct. 1407 (1992), belies this constitutional limitation on the power of Congress.[6]

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[6] The line of cases cited by Respondents at pages 10-11 of their Brief in Opposition stands only for the proposition that "it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is *per se* an offense against the Fourteenth Amendment," *International Union of Electrical, Radio and Machine Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 243-44 (1976) (quoting *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 315-16 (1945)). As Petitioner raises a separation of powers challenge to Section 27A, not a due process challenge, *dictum* regarding the Fourteenth Amendment is a far cry from the imprimatur the United States and Respondents suggest the Supreme Court has bestowed on any retroactive legislation that affects pending cases.

CONCLUSION

The circuit conflict concerning the separation of powers question posed by this case compounds the already compelling reasons to issue a writ of certiorari.

Respectfully submitted,

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